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1982 Survey of Recent Developments in Indiana Law

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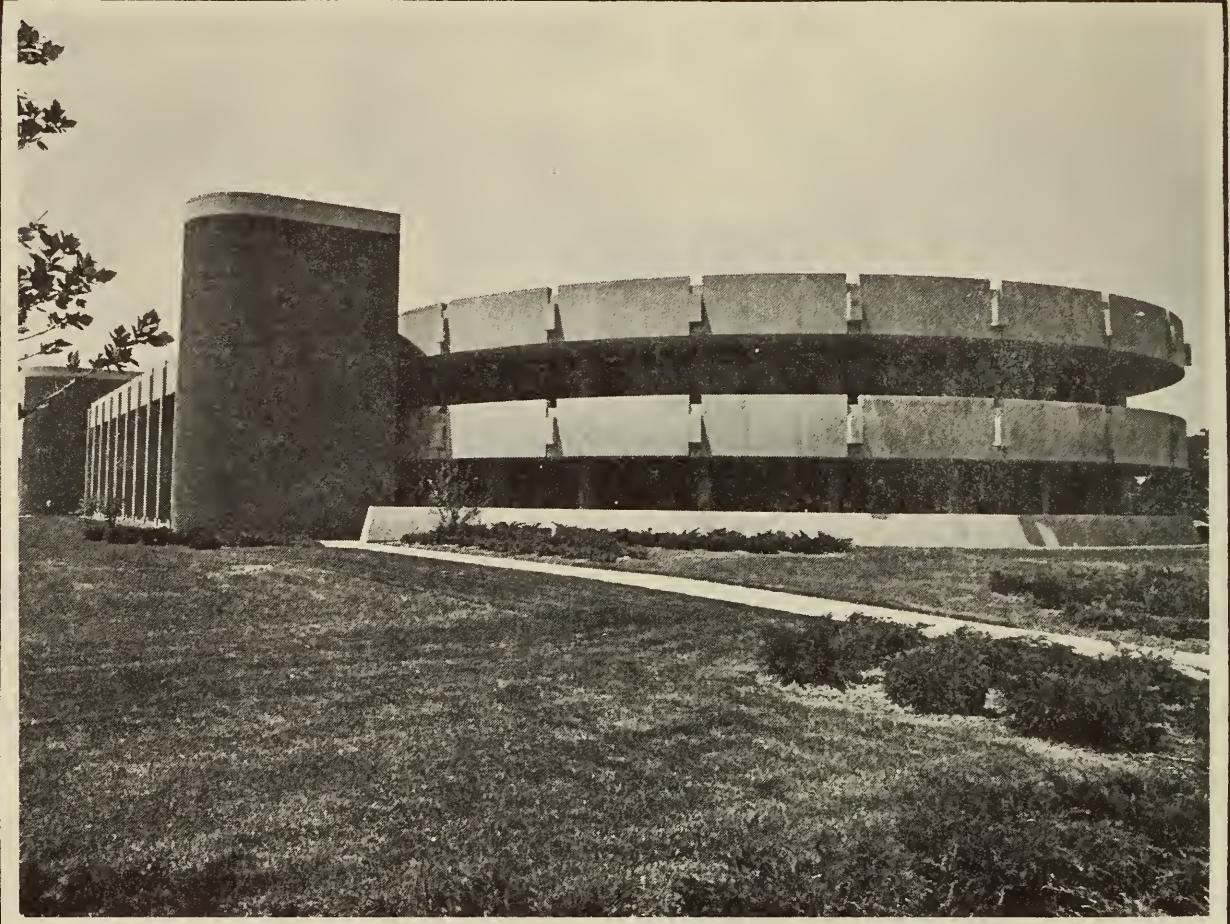
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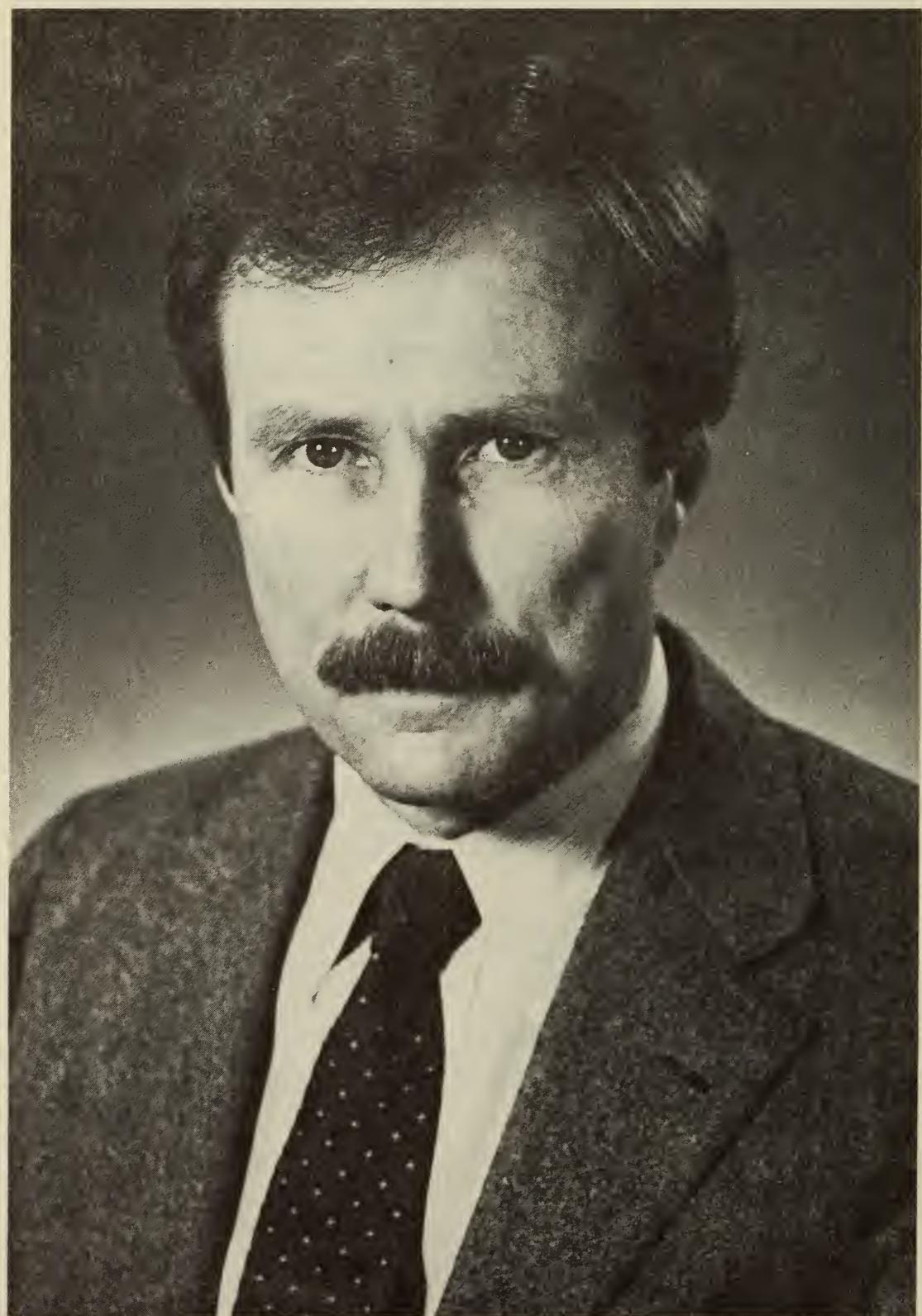
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DEAN GERALD L. BEPKO

Dedication

I met Gerald Bepko in 1970 when he decided to return to law teaching after his completion of an LL.M. degree at Yale Law School. To the great good fortune of this school, he joined the faculty at the Indiana University School of Law—Indianapolis. Instantly, Gerald Bepko became a favorite of both students and faculty, and his teaching has won multiple awards voted by the students themselves. Because he and I have appeared on many programs together, I have had the opportunity to observe the impressive talents he displays whenever he steps to the lectern (though I here disclaim any warranty of appreciation for the jokes that sometimes start his presentation).

In addition to being an outstanding professor, Gerald Bepko is a fine administrator. Organizations too numerous to list here have recognized his abilities and have enlisted his help year after year in keeping their affairs running smoothly. One example is the Federal Judges Association which has relied upon Gerald Bepko for a decade now. Another example is Gerald Bepko's recent appointment to the Indiana Conference of Commissioners on Uniform State Laws by Governor Robert Orr.

In choosing a new dean, Indiana University had the good sense to make Gerald Bepko the Dean of the Indianapolis Law School. In this day and age, it takes courage to be the dean of a law school, and it takes considerable talent to be successful in that position. Though his tenure in that role is still quite new, I am confident that Gerald Bepko, with his intelligence, persuasive abilities, extraordinary tact, and generous sense of humor, will one day occupy a proud niche in the law school's history.

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Survey of Recent Developments in Indiana Law

The Board of Editors of the *Indiana Law Review* is pleased to publish its eighth annual Survey of Recent Developments in Indiana Law. This survey covers the period from June 1, 1981, through May 1, 1982. It combines a scholarly and practical approach in emphasizing recent developments in Indiana case and statutory law. Selected federal case and statutory developments are also included. No attempt has been made to include all developments arising during the survey period or to analyze exhaustively those developments that are included.

I. Administrative Law

SCOTT A. SMITH*

A. Due Process

1. *Right to Hearing*.—As noted in the 1982 Administrative Law Survey,¹ cases involving the due process rights of suspended, demoted or dismissed police officers occupied much of the courts' time in 1981. This trend continued unabated during this survey period. These cases generally raised one of two separate due process issues: the right of a suspended or demoted police officer to a due process administrative hearing and, should such a right exist, the stage of the administrative proceedings at which that hearing must take place.

In *Sheridan v. Town of Merrillville*,² the Merrillville police chief, Sheridan, was removed as chief and reinstated to his former rank of captain; his salary remained unchanged. No notice or opportunity for hearing was given to Sheridan prior to his removal as police chief.

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¹Lewis, *Administrative Law, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 1, 1-4 (1982).

²428 N.E.2d 268 (Ind. Ct. App. 1981).

Following an unsuccessful judicial review in an attempt to obtain reinstatement as chief, Sheridan appealed.

The first district of the Indiana Court of Appeals held that Sheridan's removal as chief without notice and opportunity for hearing did not violate Sheridan's due process rights.³ The court ruled that Sheridan did not have a property right in his continued tenure as police chief which would be protected by the due process clause of the fourteenth amendment to the United States Constitution,⁴ or by certain Indiana statutes⁵ and local ordinances.⁶ The key to the court's holding was that Sheridan simply was reinstated to the position he had held prior to his appointment as chief and suffered no demotion or cut in pay;⁷ therefore, Sheridan suffered no deprivation of a property right, and the failure to accord Sheridan an opportunity to be heard prior to his demotion was not improper.⁸

Conversely, in *Howard v. City of Kokomo*,⁹ the Kokomo police chief, Howard, was removed from office and demoted to patrolman; prior to his appointment as police chief, he had served as the assistant chief. Again, no notice or opportunity for an administrative hearing was accorded Howard prior to his demotion. Given these facts, and relying upon *Sheridan and State ex rel. Warzyniak v. Grenchik*,¹⁰ the fourth district court of appeals concluded that, although the board had the power to remove Howard as chief of police, the demotion to patrolman without an opportunity for a hearing violated Howard's due process rights.¹¹

Once it has been established that a demoted or discharged public employee has a due process right to notice and opportunity for an administrative hearing, at what stage of the administrative proceeding must the hearing occur? This issue was confronted by the first and fourth districts of the Indiana Court of Appeals during the survey period. In *Shoaf v. City of Lafayette*,¹² Shoaf, a Lafayette police officer,

³*Id.* at 272.

⁴*Id.* at 272 (citing U.S. CONST. amend. XIV, § 1).

⁵428 N.E.2d at 272 (citing IND. CODE §§ 19-1-25-1 to -4 (1976) (repealed 1981) (current version at *id.* §§ 36-8-9-1 to -6 (1982))).

⁶428 N.E.2d at 272 (citing Merrillville, Ind., Ordinance 72-15, § 4 (December 12, 1972)).

⁷428 N.E.2d at 272.

⁸The holding in *Sheridan* is in accord with the third district's holding in *State ex rel. Warzyniak v. Grenchik*, 379 N.E.2d 997 (Ind. Ct. App. 1978). The *Warzyniak* court found that a city ordinance creates an expectation on the part of the policemen, which in turn constitutes a property interest protected by the due process clause of the fourteenth amendment. *Id.* at 1002. However, this right does not apply to a police chief who has been appointed. A police chief may not, however, be demoted below his previously-held rank without a hearing. *Id.* at 1002.

⁹429 N.E.2d 659 (Ind. Ct. App. 1981).

¹⁰379 N.E.2d 997 (Ind. Ct. App. 1978).

¹¹429 N.E.2d at 661-62.

¹²421 N.E.2d 1168 (Ind. Ct. App. 1981).

was dismissed from the Lafayette police force pursuant to Indiana Code section 18-1-11-3.¹³ The record indicated that the Lafayette Police Civil Service Commission, after receiving a report of Shoaf's misconduct, elected at its next regular meeting to dismiss Shoaf and to allow him ten days during which he could present his case before the Commission to show cause why he should not have been terminated.¹⁴ Although Shoaf had been put on formal notice of his possible dismissal before the meeting at which he was discharged, he was not present at that meeting and had no notice that his potential dismissal was to be decided at that meeting. Shoaf timely requested the opportunity to present his case and, following an administrative hearing in which Shoaf was represented by counsel and a record was made, the decision to dismiss Shoaf was confirmed. After the reviewing court upheld the Commission's order of dismissal, Shoaf appealed.

The fourth district ruled that Shoaf was effectively discharged at the Commission's meeting, not at the subsequent administrative hearing, and that Shoaf's dismissal therefore violated the statutory requirement that a police officer may only be dismissed "for . . . cause . . . after written notice is served upon such member . . . and after an opportunity for a hearing is given."¹⁵ The court refused the invitation to treat the subsequent administrative hearing as a "cure" of any due process violations that may have occurred as a consequence of the Commission's summary dismissal of Shoaf; once the Commission made the decision to dismiss Shoaf, according to the court, it was without statutory authority or jurisdiction to conduct any further proceedings in Shoaf's case.¹⁶

In *Grisell v. Consolidated City of Indianapolis*,¹⁷ the first district approved the "cure" theory rejected by the fourth district in *Shoaf*. An Indianapolis policeman, Grisell, was demoted from sergeant to patrolman during a hearing, authorized by statute,¹⁸ before the Board of Captains for the Indianapolis Police Department. Grisell was not represented by counsel at the Board of Captains' hearing and no record of that hearing was made. Grisell then appealed to the Indianapolis Police Merit Board and, again pursuant to the statutory scheme, was given a de novo hearing on the charges brought against him. Grisell was represented by counsel at this second stage, and a full record was made. After Grisell's demotion was sustained by the Merit Board,

¹³*Id.* at 1169 (citing IND. CODE § 18-1-11-3 (1976) (repealed 1981) (current version at *id.* §§ 36-8-1-12, 36-8-3-4(b) to -4(m), 36-8-3-5 (1982)).

¹⁴421 N.E.2d at 1169.

¹⁵See *supra* note 13.

¹⁶421 N.E.2d at 1171-72.

¹⁷425 N.E.2d 247 (Ind. Ct. App. 1981).

¹⁸IND. CODE § 18-4-12-27 (1976) repealed by Act of Apr. 27, 1981, Pub. L. No. 316, 1981 Ind. Acts 3135, 3148 (repeal of statute does not take effect until Jan. 1, 1984).

Grisell sought judicial review of the Merit Board action, and subsequently appealed the trial court's adverse ruling.

On appeal, Grisell contended that his due process rights were violated at the Board of Captains' stage of the administrative process, inasmuch as he had not been represented by counsel, and no record of those proceedings had been made. The first district court of appeals ruled that Grisell's due process rights were not violated.¹⁹ Two elements of the case proved to be crucial. First, the court placed considerable emphasis upon the fact that the Board of Captains' findings, for which no record that could be reviewed existed, were not used as evidence at the Merit Board stage; rather, the city "developed its case anew" and introduced before the Merit Board the same substantive evidence upon which it relied at the Board of Captains' stage.²⁰ In this manner, according to the court, even if there had been a deficiency in the Board of Captains' hearing which could not be reviewed, the de novo hearing before the Merit Board cured any such deficiency:

The Merit Board's function in the disciplinary scheme in this respect is to insure that any prejudice suffered by an officer due to deficiencies in the earlier proceedings is cured. The constitutional problem raised by Grisell was not manifest in the instant action and he has suffered no prejudice by the manner in which the disciplinary proceedings were conducted. Due process requires only one full-blown, trial-type administrative hearing. To require counsel and record at the earlier non-binding proceeding would be duplicative and would result in unwarranted additional administrative time and expense.²¹

The second element of the case which the court found to be crucial was the fact that the Merit Board hearing satisfied all due process requirements.²² Grisell was represented by counsel; the proceeding was de novo; new findings of fact were entered; and a full record was made. Thus, any procedural defects that might have pervaded the first hearing were "cured" by the second hearing.²³

On the surface, *Grisell* and *Shoaf* may appear to be irreconcilable. However, a key distinction between the two cases is in the nature of the administrative hearing held in each. In *Grisell*, the first district emphasized that although Grisell had effectively been demoted at the

¹⁹425 N.E.2d at 254.

²⁰*Id.* at 253.

²¹*Id.* at 253-54.

²²*Id.*

²³*Id.* at 253.

first Board of Captains' hearing, the Merit Board hearing, which did comply with due process principles, was a true de novo proceeding and the burden remained upon the city to justify Grisell's demotion. In *Shoaf*, on the other hand, the subsequent administrative hearing was found not to be a true de novo proceeding in the sense that the burden at that hearing fell upon Shoaf to prove why he should not be dismissed.

Subsequent to *Grisell*, however, the fourth district served notice that it may have abandoned its position in *Shoaf* and that it may now subscribe to the "cure" theory advocated in *Grisell*. In *Natural Resources Commission of the Department of Natural Resources v. Sullivan*,²⁴ Sullivan, an employee of the Natural Resources Commission, was summarily demoted by the superintendent of Sullivan's division without notice or opportunity for a hearing. Pursuant to statute,²⁵ Sullivan requested a public hearing before the Commission. An evidentiary hearing was held, and Sullivan's demotion was approved by the hearing officer. Upon judicial review, although Sullivan did not object to the manner in which the evidentiary hearing was conducted, he did assert that his due process rights were violated by the initial decision to demote him summarily without notice or opportunity for a hearing. The trial court, upon review, agreed with Sullivan's position and directed that he be restored to his original rank with back pay.

In reversing the trial court's holding and reinstating the Commission's decision, the fourth district relied heavily upon *Grisell* in holding that Sullivan's due process rights were protected by the subsequent administrative hearing:

In accord with the Court in *Grisell*, we also hold that where an appeal is taken from a full administrative hearing and there is no demonstration that prejudice occurring in an earlier proceeding affected the later hearing, due process rights are adequately safeguarded. Even assuming, *arguendo*, Sullivan was wrongly denied an arraignment proceeding before the Superintendent ordered his demotion, such error was cured by the subsequent administrative hearing.²⁶

Thus, because Sullivan's rights were adequately safeguarded by the subsequent hearing, the fact that he was not afforded the opportunity for a hearing at the time his demotion first took effect was held not to be wrongful.²⁷ It is significant to note that the *Sullivan*

²⁴428 N.E.2d 92 (Ind. Ct. App. 1981).

²⁵IND. CODE § 14-3-4-7 (1982).

²⁶428 N.E.2d at 100.

²⁷The *Sullivan* decision also was concerned with the scope of judicial review. See *infra* notes 98-100 and accompanying text.

court quoted at length from *Grisell* in its opinion; *Shoaf*, on the other hand, was never mentioned by the court.

Although *Sullivan* certainly seems to implicitly repudiate *Shoaf*, a key distinction between the two cases must be noted. In *Sullivan*, according to the controlling disciplinary statute,²⁸ *Sullivan* was absolutely entitled to request a full due process hearing within ten days after the summary decision to demote him. Thus, the administrative agency in *Sullivan* was still acting within its statutory authority when it offered *Sullivan* the subsequent due process hearing. However, no such statutory authority existed in *Shoaf*; once the administrative agency had rendered its initial decision to discharge, according to the fourth district, the agency had no further jurisdiction to permit an administrative due process hearing. Thus, although the continued vitality of *Shoaf* is unclear, it should not be considered totally overruled by *Sullivan*.

2. *Right to Counsel*.—Two rulings of the third district of the Indiana Court of Appeals, issued approximately one month apart, raise interesting issues regarding the rights of parties to an administrative adjudication to be notified of their right to counsel. In *Gordon v. Review Board of the Indiana Employment Security Division*,²⁹ an unemployment compensation claimant's application for benefits was denied by a referee of the Indiana Employment Security Division. The referee's decision was affirmed by the full Review Board, and the claimant sought judicial review. The claimant admittedly was advised of her right to counsel prior to the referee's hearing;³⁰ however, she was not advised as to the availability of free legal counsel and, in fact, was not represented by an attorney at that hearing. The claimant contended that she was denied due process by the fact that she was indigent and did not know that free legal counsel existed.

The court held that, upon the facts of the case, due process did not require the claimant to be advised of the availability of free legal counsel.³¹ Despite the fact that she did not have counsel at the hearing, according to the court, the referee was under a statutory duty to conduct an independent examination of all witnesses to insure complete presentation of the claimant's case.³² The court held that the referee in *Gordon* fulfilled that statutory duty, and that the claimant's case was completely and adequately presented at the hearing, despite her lack of counsel; therefore, no due process violation occurred.

²⁸IND. CODE § 14-3-4-7 (1982).

²⁹426 N.E.2d 1364 (Ind. Ct. App. 1981).

³⁰*Id.* at 1367. The Indiana Court of Appeals has held that an unemployment claimant must be notified of his or her right to counsel before a hearing may occur. *Sandlin v. Review Bd. of the Ind. Employment Sec. Div.*, 406 N.E.2d 328 (Ind. Ct. App. 1980).

³¹426 N.E.2d at 1367.

³²*Id.* at 1366-67 (citing 640 IND. ADMIN. CODE § 1-11-3 (1979)).

The *Gordon* court's emphasis upon the referee's actual presentation of the claimant's case³³ raises two important questions. First, does a claimant in an administrative adjudication have a due process right to be notified of the availability of free legal counsel when the hearing officer is *not* under a statutory duty to insure complete presentation of the claimant's case; and second, does a hearing officer who actually conducts a complete presentation of a claimant's case, regardless of any statutory duty to do so, cure any due process violation that might otherwise have existed based upon lack of notice of availability of free legal counsel?

Although any guidance on the first question will necessarily have to wait for future cases, the *Gordon* court's reliance upon the referee's *actual presentation* of the claimant's case suggests that the second question may be answered in the affirmative; that is, if a claimant's case is completely presented, then due process is satisfied. Because whether a claimant's case has been fully presented by a hearing officer will necessarily depend upon the peculiar facts of each case, the consequence of *Gordon* is that the reviewing court must apply a case-by-case analysis in determining whether an agency's failure to notify an administrative claimant of the availability of free legal services violates due process.

In another unemployment compensation proceeding, *Alcoa v. Review Board of the Indiana Employment Security Division*,³⁴ the third district court had occasion to consider the employer's contention that it was denied due process by the referee's failure to inform it of its right to counsel before the referee's hearing.³⁵ The court quoted from *Goldberg v. Kelly*³⁶ and ruled that "the opportunity to be heard must be tailored to the capabilities and circumstances of those who are to be heard."³⁷ The court further found that Alcoa was situated differently than unemployment claimants generally, and the court ultimately decided that Alcoa's failure to be notified of its right to counsel did *not* violate Alcoa's due process rights.³⁸ Judge Garrard, however, refused to join in this portion of the majority's opinion.³⁹

Significantly, the third district's reliance upon the "capabilities and circumstances"⁴⁰ of Alcoa suggests that other respondents who are less capable may be entitled to notice of their right to counsel under certain circumstances. It would appear that, as in *Gordon*, the

³³426 N.E.2d at 1367.

³⁴426 N.E.2d 54 (Ind. Ct. App. 1981).

³⁵Again, unemployment claimants are absolutely entitled to such notice. See *supra* note 30.

³⁶397 U.S. 254 (1970).

³⁷426 N.E.2d at 59 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970)).

³⁸426 N.E.2d at 59.

³⁹*Id.* at 60-61.

⁴⁰*Id.* at 59.

court has established another case-by-case test for determining whether an administrative party is entitled to notice of its right to counsel. Unfortunately, the *Alcoa* court did not set forth in its opinion the capabilities and circumstances upon which the employer's right to notification is based. It is hoped that future cases will establish these guidelines.

The case-by-case approach taken in both *Gordon* and *Alcoa* deserves additional comment. The most facile approach, from the standpoint of judicial and administrative economy, would be to require a hearing officer to notify *all* parties to any administrative adjudication of their right to representation by counsel or of the availability, if appropriate, of free counsel. Both *Gordon* and *Alcoa* force the reviewing court to examine, on a case-by-case basis, matters which are extrinsic to the merits of the agency's action and decision. It cannot be foretold at this point how much of a burden these case-by-case analyses of side issues will impose upon reviewing courts; the number of future cases where these analyses might become germane is uncertain.

3. *Double Jeopardy*.—In *Cross v. State ex rel. Linton*,⁴¹ Linton, a Michigan City police officer, was suspended unilaterally by the chief of the Michigan City police for ten days due to Linton's alleged neglect of duty. During his suspension, Linton was advised by the Michigan City Police Service Commission that a hearing would be held on the same charges which had resulted in Linton's suspension by the chief of police. The hearing was held subsequently, at which time the Commission elected to dismiss Linton permanently from the Michigan City Police Department. On judicial review, Linton failed to allege error in the police chief's ten-day suspension without prior opportunity for a hearing and, thus, waived that assertion of error. On appeal of the trial court's affirmance, the only argument available to Linton was that the doctrine of double jeopardy precluded the Commission from increasing the ten-day suspension originally imposed by the police chief.

The fourth district rejected Linton's argument and held that double jeopardy was no bar to Linton's discharge from the police force.⁴² Relying heavily upon an Illinois case which the court found to be directly on point,⁴³ the court ruled that the double jeopardy doctrine is inapplicable to civil proceedings, including administrative adjudications.⁴⁴

⁴¹419 N.E.2d 991 (Ind. Ct. App. 1981).

⁴²*Id.* at 996.

⁴³*Id.* at 995 (citing *Bart v. State Dep't of Law Enforcement (Div. of State Police)*, 52 Ill. App. 3d 487, 367 N.E.2d 773 (1977)).

⁴⁴419 N.E.2d at 995-96. For further discussion of the nonapplicability of double jeopardy to disciplinary hearings, see *In re Kesler*, 397 N.E.2d 574 (Ind. 1979).

4. *Applicability of Trial Rules.*—In *Josam Manufacturing Company v. Ross*,⁴⁵ the third district of the Indiana Court of Appeals held that the discovery provisions of the Indiana Trial Rules⁴⁶ are applicable to all adjudicatory hearings before administrative agencies.⁴⁷ Furthermore, the court indicated that Trial Rule 37,⁴⁸ which specifies sanctions for failure to comply with discovery requests, would be applicable to a party to an administrative hearing where the other party has improperly resisted discovery.⁴⁹

However, a majority of the third district held that where a party to an administrative adjudication is forced to maintain a civil action to compel the opposing party's compliance with the administrative agency's discovery orders, the petitioning party may not obtain attorney fees in conjunction with the civil action, absent an order for sanctions from the administrative agency.⁵⁰

Because the Industrial Board, the agency involved in *Ross*, has no authority to enforce its own orders,⁵¹ *Ross* suggests that the proper way to obtain a full range of sanctions for failure to comply with administrative discovery orders is to move the agency to order sanctions, and then to seek enforcement of the agency's order from the trial court.

B. Exhaustion of Administrative Remedies

One of the most time-honored maxims of administrative law is that an aggrieved party must exhaust all administrative remedies available to it before the party may seek judicial action. However, in *Town of St. John v. Home Builders Association of Northern Indiana, Inc.*,⁵² the third district court of appeals reiterated the equally well-recognized exception to this rule that where the validity of administrative quasi-legislation is at issue, administrative remedies need not be exhausted. In *Town of St. John*, the plaintiff filed a complaint for declaratory judgment asserting that the town's local building ordinance for the construction of one and two family dwellings was invalid. The town contended that the trial court had no jurisdiction over the case because the plaintiff had failed to exhaust its administrative remedies.

⁴⁵428 N.E.2d 74 (Ind. Ct. App. 1981).

⁴⁶*Id.* at 75 (citing IND. R. TR. P. 26-37).

⁴⁷428 N.E.2d at 77. IND. R. TR. P. 28(F) specifies that the discovery provisions of the Indiana Trial Rules may be employed by any party to an administrative adjudicatory hearing.

⁴⁸428 N.E.2d at 77 (citing IND. R. TR. P. 37).

⁴⁹428 N.E.2d at 77.

⁵⁰*Id.* at 77-78 & n.2. Judge Staton dissented from this portion of the court's opinion. *Id.* at 78-80.

⁵¹*Id.* at 78 n.2.

⁵²428 N.E.2d 1299 (Ind. Ct. App. 1981).

The third district, citing numerous cases in support of its position,⁵³ held that administrative remedies need not be exhausted where a party attacks an ordinance's validity in its entirety.⁵⁴

Another interesting issue pertaining to the exhaustion requirement arose in *Metropolitan Development Commission of Marion County v. Waffle House, Inc.*⁵⁵ In that case, Waffle House had applied for a permit to erect a pole sign upon its premises; eventually, Waffle House erected the sign without securing the permit. The Metropolitan Development Commission then filed a lawsuit against Waffle House requesting injunctive relief and the imposition of a fine. After a judgment in Waffle House's favor, the Development Commission appealed.

On appeal, the Development Commission proffered the novel argument that Waffle House should have been prevented from presenting evidence in defense of the lawsuit brought by the Development Commission on the ground that Waffle House had failed to exhaust its administrative remedies; in other words, Waffle House did not have its permit when it erected the sign. The second district concluded that, because in this case the administrative agency had hailed Waffle House into court, and not *vice versa*, the exhaustion doctrine was inapplicable.⁵⁶

The *Waffle House* court also discussed, at considerable length, the theoretical distinctions between the exhaustion principle and the "primary jurisdiction" doctrine.⁵⁷ The court pointed out that the exhaustion requirement deals with judicial self-limitation—the judiciary's refusal to pass upon issues that are capable of resolution by an administrative agency. The doctrine of primary jurisdiction, however, totally divests the judiciary of its right to hear a particular matter due to the desire and need for the administrative agency's expert judgment on a technical question.⁵⁸

⁵³*Id.* at 1303 (citing Indiana Toll Rd. Comm'n v. Jankovich, 244 Ind. 574, 193 N.E.2d 237 (1963), *appeal dismissed*, 379 U.S. 487 (1964); *State ex rel. City of South Bend v. St. Joseph Superior Court*, 238 Ind. 88, 148 N.E.2d 558 (1958); *Indiana Envtl. Management Bd. v. Indiana-Kentucky Elec. Corp.*, 393 N.E.2d 213 (Ind. Ct. App. 1979)).

⁵⁴428 N.E.2d at 1303.

⁵⁵424 N.E.2d 184 (Ind. Ct. App. 1981).

⁵⁶*Id.* at 186-87.

⁵⁷*Id.* at 187. For a detailed discussion of the primary jurisdiction issues in *Waffle House*, see *infra* notes 59-62 and accompanying text.

⁵⁸424 N.E.2d at 187. This is directly contradictory to the definition of primary jurisdiction as defined by Kenneth Davis, an eminent scholar in the area. K. DAVIS, ADMINISTRATIVE LAW TEXT § 19.01 (3d ed. 1972). According to Davis, "[t]he doctrine of primary jurisdiction does not necessarily allocate power between courts and agencies, for it governs only the question whether court or agency will *initially* decide a particular issue, not the question whether court or agency will *finally* decide the issue." *Id.* § 19.01, at 373.

C. Primary Jurisdiction

In *Metropolitan Development Commission of Marion County v. Waffle House, Inc.*,⁵⁹ wherein the Metropolitan Development Commission sought to force a business owner, Waffle House, to remove a pole sign for which Waffle House had been given no permit to erect,⁶⁰ the Development Commission asserted that Waffle House was prevented from presenting any defense to its complaint for injunctive relief, as a matter of law, based upon the doctrine of primary jurisdiction. The court noted that, unlike the usual situation, the administrative agency was the plaintiff and the agency had gone to court willingly in an attempt to halt what it perceived as a violation of administrative and statutory guidelines. The doctrine of primary jurisdiction, according to the court, loses all force and effect when the agency itself comes to court; in net effect, the agency is waiving its "special expertise" upon which the doctrine of primary jurisdiction is based.⁶¹ In so ruling, the second district stated the following:

[W]hen the agency itself prosecutes and as plaintiff initiates a law suit, and is present in court pursuing what it perceives to be its interests, it would be manifestly unfair to require a defendant in this posture to supinely accept damaging evidence presented by the agency without the opportunity to defend against that evidence.⁶²

In short, the clear import of *Waffle House* is that administrative agencies will not be permitted to hide behind principles of administrative law which are designed to prevent unwarranted judicial interference with the administrative process—in particular, exhaustion of administrative remedies and primary jurisdiction—where the agency is, itself, responsible for instituting the legal action. This result obviously is supported by fundamental principles of fairness.

D. The Requirement of Findings

During the 1982 survey period, the saga of Benedicto Perez, whose travels were well-documented in two separate Articles in last year's Survey,⁶³ finally came to an end. Perez, who sustained an industrial accident in 1970, sought benefits for total permanent disability before

⁵⁹424 N.E.2d 184 (Ind. Ct. App. 1981).

⁶⁰The facts of this case have been previously discussed at length. See *supra* notes 55-56 and accompanying text.

⁶¹424 N.E.2d at 187-88.

⁶²*Id.* at 188.

⁶³See Leibman, *Workers' Compensation, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 453, 455-58 (1982); Lewis, *supra* note 1, at 20-22.

the Indiana Industrial Board. After the Industrial Board ruled that Perez was not permanently totally disabled, Perez sought judicial review. The court of appeals ruled that the Industrial Board's findings of fact were inadequate and remanded the cause to the Industrial Board for more specific findings.⁶⁴ On remand, the Industrial Board reaffirmed its earlier award, and the court of appeals then affirmed the Industrial Board's decision based upon what the court perceived to be an appropriate record.⁶⁵ Perez then sought transfer to the Indiana Supreme Court.

In *Perez v. United States Steel Corp.*,⁶⁶ the Indiana Supreme Court granted transfer, ruled that the Industrial Board's findings of fact that the court of appeals had considered on the second appeal were still inadequate, and vacated the court of appeals' opinion and remanded the case to the Industrial Board for further findings of fact.⁶⁷ In so doing, the supreme court commented at length upon the specificity that findings of fact at the administrative level must meet. The court distinguished between findings of *basic* fact and findings of *ultimate* fact—the basic facts being those upon which the ultimate factual determinations rest—and ruled that agency findings of fact must contain *both* the basic and the ultimate facts supporting the administrative agency's decision.⁶⁸ The essence of the supreme court's holding is concisely summarized in a portion of the court's opinion as follows:

To elaborate, findings of basic fact must reveal the [agency's] analysis of the evidence and its determination therefrom regarding the various specific issues of fact which bear on the particular claim. The "finding of ultimate fact" is the ultimate factual conclusion regarding the particular claim before the [agency]; here, for example, that ultimate question is whether Perez is permanently totally disabled. The finding of *ultimate* fact may be couched in the legal terms and definitions which govern the particular case. In contrast, the specific findings of basic fact must reveal the [agency's] determination of the various relevant sub-issues and factual disputes which, in their sum, are dispositive of the particular claim or ultimate factual question before the [agency]. The findings must be specific enough to provide the reader with an understanding of the

⁶⁴*Perez v. United States Steel Corp.*, 172 Ind. App. 242, 359 N.E.2d 925 (1977) ("Perez I").

⁶⁵*Perez v. United States Steel Corp.*, 416 N.E.2d 864 (Ind. Ct. App. 1981) ("Perez II").

⁶⁶426 N.E.2d 29 (Ind. 1981) ("Perez III").

⁶⁷*Id.* at 33.

⁶⁸*Id.* at 32.

[agency's] reasons, based on the evidence, for its finding of ultimate fact.⁶⁹

The entire *Perez* history provides a clear example of the distinction between basic and ultimate findings of fact. In its second attempt at fact finding, the Industrial Board stated one of its factual findings to be the following: "In the Board's experience, the medical findings in the evidence in this case, from both Plaintiff's and Defendant's physicians, show that Plaintiff is capable of pursuing many normal kinds of occupations. He has a permanent partial impairment, but not a permanent total disability."⁷⁰

According to the court in *Perez III*, while this statement served as a finding of ultimate fact, neither this statement nor any of the Industrial Board's other findings disclosed any basic facts upon which that particular ultimate fact rested.⁷¹ What were the physician's specific findings regarding impairment? What was Perez's medical condition? What types of occupations was Perez, in his condition, able to perform? These were the basic facts upon which the ultimate fact of "no permanent total disability" rested, and, according to the supreme court, the absence of these basic facts from the findings of the Industrial Board rendered the record defective and incapable of review.⁷² Thus, agency findings of fact must include both the ultimate factual findings and the basic facts from which those ultimate findings stem.

After the *Perez III* decision, the Industrial Board, for the third time, entered written findings of fact and conclusions of law and reaffirmed its original award. These findings of the Industrial Board went back to the supreme court, and in *Perez IV*⁷³ the supreme court determined that the Industrial Board's third effort did, indeed, meet the criteria expressed in *Perez III*. Upon its review of the now complete findings, the supreme court affirmed the Industrial Board's award which denied Perez benefits for total permanent disability.⁷⁴

In a case decided the same day as *Perez III*, *Talas v. Correct Piping Company, Inc.*,⁷⁵ the supreme court served notice that the specificity of agency findings of fact which it set forth in *Perez III* would be strictly enforced. Despite the fact that the supreme court had earlier remanded *Talas* to the Industrial Board for more specific findings of fact,⁷⁶ the supreme court relied upon *Perez III* in determining that the

⁶⁹*Id.* at 33 (emphasis in original).

⁷⁰*Id.* at 30.

⁷¹*Id.*

⁷²*Id.* at 32-33.

⁷³*Perez v. United States Steel Corp.*, 428 N.E.2d 212 (Ind. 1981) ("Perez IV").

⁷⁴*Id.* at 216-17.

⁷⁵426 N.E.2d 26 (Ind. 1981).

⁷⁶In *Talas v. Correct Piping Co.*, 409 N.E.2d 1223 (Ind. Ct. App. 1980), the court of appeals affirmed the decision of the Industrial Board which had determined that

record was still deficient and remanded the case to the Industrial Board for the entry of findings of basic facts supporting the Industrial Board's ultimate factual holdings.⁷⁷ The clear guidelines set forth in *Perez III*, coupled with the lack of reluctance shown by reviewing courts in remanding agency adjudications for more specific findings, indicate that the *Perez III* standard will be strictly interpreted for all future agency decisions in this state.

However, according to two cases decided during this survey period, the severe specificity standards set forth for agency findings of fact in *Perez III* may not apply to findings of fact entered by the reviewing court. Under the Indiana Administrative Adjudication Act⁷⁸ and the Indiana Trial Rules,⁷⁹ a reviewing court at the trial level is also required to enter findings of fact in support of its decision upon review. However, in *Goffredo v. Indiana State Department of Public Welfare*,⁸⁰ the first district court of appeals held that the reviewing court need not discuss and summarize all the evidence presented to the agency; the reviewing court's findings were sufficient if they merely contained all necessary facts to support the court's conclusions of law.⁸¹ Similarly, in *Clarkson v. Department of Insurance*,⁸² the second district held that a single finding of fact made by the reviewing trial court complied with the requirement that the reviewing court enter findings of fact, where the single finding of fact, alone, was sufficient to support the trial court's affirmance upon review of the administrative agency's decision.⁸³ Thus, the "basic"—"ultimate" dichotomy appears not to apply to a trial court's findings upon review, a fact which will no doubt free the reviewing court from exhaustive and unnecessary examinations of all underlying evidence adduced at the administrative level.

E. Scope of Judicial Review

1. Right to Judicial Review.—Under Indiana principles of constitu-

Talas' employer was not required to pay for Talas' nursing care. Talas' petition for transfer was granted, and the supreme court remanded the case to the Industrial Board for specific findings of fact. *Talas v. Correct Piping Co.*, 416 N.E.2d 845 (Ind. 1981). The Industrial Board's second attempt at specific findings of fact was also adjudged to be insufficient by the supreme court. *Talas v. Correct Piping Co.*, 426 N.E.2d 26 (Ind. 1981). The conclusion of Talas' travels will be left to a subsequent survey.

⁷⁷426 N.E.2d at 28-29.

⁷⁸IND. CODE § 4-22-1-18 (1982).

⁷⁹IND. R. TR. P. 52(A).

⁸⁰419 N.E.2d 1337 (Ind. Ct. App. 1981).

⁸¹*Id.* at 1339.

⁸²425 N.E.2d 203 (Ind. Ct. App. 1981). For other issues considered by the court in *Clarkson*, see *infra* notes 85-90 and accompanying text.

⁸³425 N.E.2d at 206.

tional law, every administrative adjudication is judicially reviewable;⁸⁴ however, that does not mean that an aggrieved party's right to review cannot be waived. In *Clarkson v. Department of Insurance*,⁸⁵ an insurance agent whose license was revoked by the Indiana Insurance Commissioner filed his verified petition with the trial court, pursuant to statute,⁸⁶ for review of the Commissioner's decision. The trial court affirmed the Commissioner's decision, and the agent appealed.

On appeal, the second district of the Indiana Court of Appeals found that many of the issues for which the agent sought review were deemed to be waived as a matter of law due to substantive defects in the petition for review. The agent asserted, for instance, that the revocation of his license deprived him of equal protection under the law; however, the agent failed to allege any violation of equal protection in his petition, which "results in a waiver of that issue [that] may not be raised on appeal."⁸⁷

Additionally, the agent had asserted in his petition that the Commissioner's decision was arbitrary, capricious, and an abuse of discretion, but he cited no authority in support of his position. In holding that this claim of error was waived as well, the court of appeals held the following:

However, a bald assertion in the petition for review that the action of the agency is arbitrary, capricious, or an abuse of discretion does not create an issue. Rather, as earlier stated, the petition must specifically allege in what manner the order,

⁸⁴See *Warren v. Indiana Tel. Co.*, 217 Ind. 93, 26 N.E.2d 399 (1940). The same right to judicial review is accorded under the Indiana Administrative Adjudication Act, IND. CODE § 4-22-1-14 (1982).

⁸⁵425 N.E.2d 203 (Ind. Ct. App. 1981).

⁸⁶IND. CODE § 4-22-1-14 (1982) provides in part:

Any party or person aggrieved by an order or determination made by any such agency shall be entitled to a judicial review thereof in accordance with the provisions of this act. Such review may be had by filing with the circuit or superior court of the county in which such person resides, or in any county in which such order or determination is to be carried out or enforced, a verified petition setting out such order, decision or determination so made by said agency, and *alleging specifically* wherein said order, decision or determination is:

(1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or
(2) Contrary to constitutional right, power, privilege or immunity; or
(3) In excess of statutory jurisdiction, authority or limitations, or short of statutory right; or
(4) Without observance of procedure required by law; or
(5) Unsupported by substantial evidence.

Id. (emphasis added).

⁸⁷425 N.E.2d at 206.

decision, or determination is arbitrary, capricious, or an abuse of discretion, I.C. 4-22-1-14, and thereby raise an issue.⁸⁸

The message of *Clarkson* is obvious: the traditional doctrine of notice pleading in civil cases does not apply to judicial review of agency adjudications. Like a motion to correct errors under Trial Rule 59,⁸⁹ issues which are inadequately raised by a verified petition for review or are omitted altogether from the petition will not be reviewed by the court.⁹⁰ It is incumbent upon every party seeking review of an administrative adjudication to allege every possible error with as much specificity and factual and legal support as possible in the verified petition for review; otherwise, the risk of waiver is paramount.

The right to judicial review of adverse agency actions can also be waived by the *untimely* filing of a verified petition for review. In *Shettle v. Smith*,⁹¹ the first district court of appeals held that non-compliance with the fifteen-day limit⁹² for the filing of an action for judicial review is a fatal defect and deprives the reviewing court of all jurisdiction to hear the case.⁹³ The court's characterization of the nature of the error as jurisdictional again suggests that the verified petition for review is to be treated exactly like a motion to correct errors for the purposes of judicial review.⁹⁴ In other words, the time limit for filing a verified petition for review cannot, in all likelihood, be extended.⁹⁵ The practitioner should be alert to these precise prerequisites to the proper perfection of an action for judicial review.

2. *The Substantial Evidence Test.—Past Administrative Law*

⁸⁸*Id.* at 207.

⁸⁹IND. R. TR. P. 59.

⁹⁰Numerous decisions exist regarding the specificity required to sustain a motion to correct errors under Trial Rule 59. See, e.g., *White v. Livengood*, 390 N.E.2d 696 (Ind. Ct. App. 1979); *State ex rel. Sacks Bros. Loan Co. v. DeBard*, 381 N.E.2d 119 (Ind. Ct. App. 1978). Arguably, these decisions apply to both the judicial review setting and the requirements of the verified petition for review.

⁹¹425 N.E.2d 713 (Ind. Ct. App. 1981).

⁹²*Id.* at 715. Indiana Code section 4-22-1-14 establishes a fifteen-day period for filing of a verified petition for review with the trial court, which runs from the date of receipt of notice of an agency final determination. Indiana Code section 4-22-1-14 applies only to administrative actions that fall within the purview of the Indiana Administrative Adjudication Act; agencies not bound by the Administrative Adjudication Act have established different time limits for filing. See, e.g., IND. CODE §§ 22-3-4-8, 22-3-7-27 (1982) (thirty-day period for filing assignment of errors with the court of appeals in Industrial Board cases); IND. CODE §§ 8-1-3-1 to -12 (1982) (thirty-day period for filing assignment of errors with court of appeals in Public Service Commission cases).

⁹³425 N.E.2d at 715.

⁹⁴The sixty-day deadline for the filing of a motion to correct errors following an adverse civil judgment, Rule 59 of the Indiana Trial Rules, is also jurisdictional and noncompliance with it deprives the appellate court of jurisdiction to hear the appeal. *Gillian v. Brozovic*, 166 Ind. App. 682, 337 N.E.2d 152 (1975).

⁹⁵See *White v. Livengood*, 390 N.E.2d 696 (Ind. Ct. App. 1979).

Surveys have uniformly contained lengthy discussions upon the different versions of the substantial evidence test employed by the different districts of the Indiana Court of Appeals. All districts recognize that an administrative adjudication which is not supported by substantial evidence is subject to reversal and remand upon judicial review. In employing the substantial evidence test, however, may the reviewing court examine the *entire* administrative record in deciding whether an agency determination of fact is supported by substantial evidence, or is the reviewing court's examination of the record limited *only* to that evidence which supports the agency's determination? Previous authors of this section of the Survey, although guardedly optimistic in their hope that the different districts of the Indiana Court of Appeals were on the verge of uniformity in mandating "whole record" judicial review, have reported that the situation is far from settled. Cases decided during this survey period leave room for optimism—but unfortunately some confusion—on this point.

As reported in the 1981 Administrative Law Survey,⁹⁶ the fourth district, in *Wilfong v. Indiana Gas Co.*,⁹⁷ apparently departed from its prior holdings and ruled that judicial review of a Public Service Commission decision would be based only upon evidence favorable to the agency's position. In *Natural Resources Commission of the Department of Natural Resources v. Sullivan*,⁹⁸ however, the fourth district apparently reverted to its pre-*Wilfong* position and held that judicial review of an agency's demotion of one of its employees should be based upon the record as a whole. Relying upon *Universal Camera Corp. v. NLRB*,⁹⁹ the *Sullivan* court ruled that "the trial court must examine the *whole record* to determine whether 'the agency's decision lacks a reasonably sound basis of evidentiary support.'"¹⁰⁰

The third district, in three cases decided during the survey period, sent out conflicting signals as to whether it preferred "whole record" or "favorable evidence" review. In both *Alcoa v. Review Board of the Indiana Employment Security Division*¹⁰¹ and *L. W. Edison, Inc. v. Teagarden*,¹⁰² the third district ruled that it would consider only the evidence, and those reasonable inferences drawn therefrom, that tend to support the agency's decision.¹⁰³ In both cases, the agency's factual

⁹⁶Greenberg, *Administrative Law, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 65, 66 (1981).

⁹⁷399 N.E.2d 788 (Ind. Ct. App. 1980).

⁹⁸428 N.E.2d 92 (Ind. Ct. App. 1981). For other issues considered by the court in *Sullivan*, see *supra* notes 24-28 and accompanying text.

⁹⁹340 U.S. 474 (1951).

¹⁰⁰428 N.E.2d at 101 (emphasis added and citation omitted).

¹⁰¹426 N.E.2d 54 (Ind. Ct. App. 1981). For other issues considered by the court in *Alcoa*, see *supra* notes 34-40 and accompanying text.

¹⁰²423 N.E.2d 709 (Ind. Ct. App. 1981).

¹⁰³*Alcoa*, 426 N.E.2d at 59; *Teagarden*, 423 N.E.2d at 710.

determinations were found to be supported by substantial evidence and the administrative decisions were affirmed. However, in *State Board of Tax Commissioners v. South Shore Marina*,¹⁰⁴ the third district, in reversing a trial court's contrary ruling and reinstating a State Board of Tax Commissioners' final assessment, resorted to "whole record" review.¹⁰⁵

Because on various occasions the different districts of the court of appeals have espoused both "whole record" and "favorable evidence" review without apparent rhyme or reason, one has to wonder if there is more to these apparent inconsistencies than meets the eye. On the one hand, it is apparent that when administrative decisions are reviewed directly by the court of appeals, the various districts are much more inclined to resort to "favorable evidence" review; administrative findings of fact in workers' compensation and unemployment compensation cases, in particular, are reviewed under the "favorable evidence" standard. On the other hand, where the court of appeals, in its true appellate capacity, passes upon a trial court's judicial review of an agency determination, the different districts uniformly appear to employ the "whole record" standard of review.¹⁰⁶ Although it is difficult to justify the different standards of review of agency findings of fact based upon whether the court of appeals acts as a first tier or second tier of review, it is clear that these distinctions are being made and that the practitioner must be alert to them.

However, it is also submitted that there may be less to these apparent inconsistencies than is initially apparent. From a practitioner's standpoint, the differences between a "whole record" and "favorable evidence" review of the agency's findings of fact *may* be nothing more than a paper tiger.¹⁰⁷ As previously noted, every district of the court of appeals has, at one time or another, supported both "whole record" and "favorable evidence" review without any apparent reason for distinguishing between the two. More significantly, it is exceedingly difficult to conjure up a situation wherein a reviewing court exercising a "favorable evidence" standard of review would affirm an administrative agency decision that would have been remanded by a "whole

¹⁰⁴422 N.E.2d 723 (Ind. Ct. App. 1981). For further discussion of this case see Boyd, *Taxation*, 1982 *Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 355, 367-70 (1983).

¹⁰⁵*Id.* at 731.

¹⁰⁶No attempt will be made to cite the large number of cases decided by the different districts of the court of appeals over the past few years which support this statement. The best indicia of this statement are the preceding Administrative Law Surveys wherein the cases and conflicts among and within the various districts of the court of appeals have been extensively analyzed. See Lewis, *supra* note 1, at 11-13; Greenberg, *supra* note 96; Greenberg, *Administrative Law*, 1979 *Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 39, 39-42 (1980).

¹⁰⁷Like his predecessors, this author uses the term "may" advisedly.

record" reviewing court. Such a situation could arise, for instance, when the agency's record overwhelmingly, but not unanimously, points to one conclusion, and the agency reaches the opposite result. Not only is this scenario an unlikely one, but the different districts' willingness to resort to a "whole record" theory on occasion suggests that the reviewing court will examine the substantiality of whatever evidence, pro or con, the parties put before it.

At the very least, no decision reported during the last few survey periods has indicated that any district will refuse to consider contrary evidence if necessary to arrive at a just result. In this fact, Indiana's practitioners can probably take some solace.

3. *Review of Agency Legal Determinations and Interpretations.*—Unlike the issue of judicial review of agency findings of fact, which as noted above has resulted in conflicts among and often within the different districts of the court of appeals, the appropriate standard of judicial review to be applied to an agency's legal interpretations is well-settled. Cases decided during the survey period support the general principle that an agency's interpretation of the law, although entitled to some deference, is not sacrosanct, and that a reviewing court is free to reverse and remand agency decisions based upon the agency's erroneous interpretation or application of the law.

For instance, in *Johnson v. Moritz*,¹⁰⁸ the first district reviewed an agency's interpretation of an Indiana statute requiring the commissioners of a municipal housing authority to file an annual report with the municipal clerk.¹⁰⁹ Appellants, housing authority commissioners, were removed from office by the mayor for failing to file the statutorily required annual report within a reasonable time. The trial court affirmed the mayor's action. The court of appeals noted that, although "the interpretation of a statute by an administrative agency is entitled to great weight," the agency's interpretation is "not binding" upon a reviewing court when that interpretation is incorrect or is contrary to the obvious legislative will.¹¹⁰ The first district held that the mayor's interpretation of the relevant statute was erroneous and that the commissioners were entitled to reinstatement.¹¹¹

¹⁰⁸426 N.E.2d 448 (Ind. Ct. App. 1981).

¹⁰⁹*Id.* at 450 (citing IND. CODE § 18-7-11-21 (1976) (repealed 1981) (current version at *id.* § 36-7-18-36 (1982))).

¹¹⁰426 N.E.2d at 451.

¹¹¹*Id.* Three other first district cases decided during the survey period also support the position that erroneous agency interpretations of law may be reversed upon review. *Illinois-Indiana Cable Television Ass'n, Inc. v. Public Serv. Comm'n*, 427 N.E.2d 1100 (Ind. Ct. App. 1981); *Department of Fin. Insts. v. Beneficial Fin. Co. of Madison*, 426 N.E.2d 711 (Ind. Ct. App. 1981); *Southern Ry. v. Board of Comm'r's of Vanderburgh County*, 426 N.E.2d 445 (Ind. Ct. App. 1981).

Similarly, in *Shettle v. Shearer*,¹¹² the third district ruled that the superintendent of the Indiana State Police had acted contrary to law in failing to issue a handgun license.¹¹³ The superintendent's decision was based upon his construction of the handgun licensing statute, Indiana Code section 35-23-4.1-5(a),¹¹⁴ and Indiana common law.¹¹⁵ One dissenter in *Shearer* suggested, however, that the court's reversal of the superintendent's decision was not a review of agency legal interpretation, but that the court's action was an improper reversal of the agency's findings of fact which were supported by substantial evidence.

Shearer raises an important point: the characterization of an issue for judicial review as "legal" or "factual" may well be dispositive of the issue's outcome. Obviously, whether an applicant for a handgun permit meets the requirements for permit approval is ordinarily a question of fact, and the resulting permit approval or denial, as a factual determination, cannot be reversed by a reviewing court if supported by substantial evidence. However, by changing the focus of the inquiry to whether the superintendent's decision was *contrary to law*,¹¹⁶ as opposed to merely unsupported by substantial evidence, the *Shearer* court accorded itself the power to review, and ultimately reverse, the superintendent's decision. The moral of the story is clear—if it appears that an agency's resolution of a factual issue is supported by substantial evidence, one should attempt to convince the court that the factual issue is, in fact, a legal issue and that *de novo* review of the legal conclusion is appropriate.

The comparative ease with which reviewing courts may reverse erroneous agency interpretations of law, however, may be threatened by at least one case decided during the survey period dealing with the doctrine of legislative acquiescence. As expressed in *Baker v. Compton*,¹¹⁷ the doctrine of legislative acquiescence generally holds that an administrative agency's long-standing erroneous interpretation of a statute, which is subsequently not amended or altered by the legislature, becomes binding upon the agency; the presumption is that the legislature's inaction indicates its satisfaction with the agency's construction.¹¹⁸

¹¹²425 N.E.2d 739 (Ind. Ct. App. 1981).

¹¹³The court did rule, however, that the trial court erred in ordering the superintendent to issue the license. *Id.* at 741. The court pointed out that the only relief a trial court could grant when an administrative agency's decision is contrary to law is to vacate that decision and remand for further agency determinations. *Id.* at 741.

¹¹⁴425 N.E.2d at 740 (quoting IND. CODE § 35-23-4.1-5(a) (1982)).

¹¹⁵425 N.E.2d at 741 (citing *Schubert v. DeBard*, 398 N.E.2d 1339 (Ind. Ct. App. 1980)).

¹¹⁶"Contrary to law" is, of course, one of the grounds upon which a reviewing court may overturn an administrative decision. See IND. CODE § 4-22-1-18 (1982).

¹¹⁷247 Ind. 39, 211 N.E.2d 162 (1965).

¹¹⁸*Id.* at 42, 211 N.E.2d at 164.

In *Indiana Department of State Revenue v. General Foods Corp.*,¹¹⁹ however, the second district appeared to take the doctrine of legislative acquiescence one step further when it suggested in a footnote to its opinion that the doctrine of legislative acquiescence also applied to judicial review of agency interpretations of law, and that the agency's prior interpretations, even though perhaps erroneous, are binding upon the reviewing court.¹²⁰ Although the court emphasized that it did not decide whether the doctrine was strictly applicable,¹²¹ the clear implication of the footnote is that the doctrine of legislative acquiescence mandated that the State Board of Revenue's prior application of an Indiana income tax statute¹²² was binding. Although the *General Foods* decision was unanimous, the footnote in question was disavowed by Judge Sullivan.¹²³

By contrast, in *Beer Distributor of Indiana, Inc. v. State ex rel. Alcoholic Beverage Commission*,¹²⁴ the first district clearly indicated that the doctrine of legislative acquiescence does not force a reviewing court to affirm an agency's erroneous interpretation of law and that an administrative interpretation that violates applicable statutes, no matter how long-standing, is "entitled to no weight."¹²⁵ It is hopeful that future cases will resolve this issue and heal the apparent split between the first and second districts.

4. *Review of Agency Rule Making.*—In a case decided during this survey period, *Neswick v. Board of Commissioners*,¹²⁶ the fourth district reaffirmed the established rule that the quasi-legislative actions of administrative agencies are not judicially reviewable in the strict sense of the word.¹²⁷ However, the court also recognized that agency quasi-legislation which is unconstitutional or otherwise illegal can always be collaterally attacked through the procedural vehicle of a declaratory judgment action.¹²⁸ The *Neswick* court reversed a trial court's conclusion that it was without jurisdiction to consider the merits of a constitutional challenge to a local zoning ordinance.¹²⁹ In *City of Ander-*

¹¹⁹427 N.E.2d 665 (Ind. Ct. App. 1981).

¹²⁰*Id.* at 670-71 & n.1 (citing *Whirlpool Corp. v. State Board of Tax Comm'rs*, 167 Ind. App. 216, 338 N.E.2d 501 (1975)).

¹²¹427 N.E.2d at 670-71 n.1.

¹²²IND. CODE § 6-2-1-2 (1976) (repealed 1981) (current version at IND. CODE § 6-2.1-2-2 (1982)).

¹²³427 N.E.2d at 671.

¹²⁴431 N.E.2d 836 (Ind. Ct. App. 1982).

¹²⁵*Id.* at 840.

¹²⁶426 N.E.2d 50 (Ind. Ct. App. 1981).

¹²⁷*Id.* at 53. For an example of the established law, see *Indiana Waste Systems v. Board of Comm'rs of Howard County*, 389 N.E.2d 52 (Ind. Ct. App. 1979).

¹²⁸426 N.E.2d at 53.

¹²⁹*Id.* at 53-54.

son v. Associated Furniture & Appliances, Inc.,¹³⁰ without passing directly on the point, the Indiana Supreme Court also noted that agency rule making can always be attacked by the filing of a complaint for declaratory and injunctive relief wherein the jurisdiction of the court is based upon a constitutional claim.¹³¹

F. Delegation of Legislative Power

In *Stanton v. Smith*,¹³² the Indiana Supreme Court was faced with an alleged unconstitutional delegation of legislative power to an administrative agency. Plaintiff in that case was an AFDC recipient¹³³ who challenged the Indiana Department of Public Welfare's twenty-five percent rateable reduction of standards used to formulate minimum AFDC benefits.

Although maximum standards of AFDC assistance are determined by statute,¹³⁴ the Indiana General Assembly delegated to the Public Welfare Department the authority to establish minimum standards of AFDC assistance within the standards set forth in the statutes.¹³⁵ One of the standards established by the General Assembly was that the Public Welfare Department could affix a rateable reduction, not to exceed thirty-five percent, to the standards used to determine minimum AFDC requirements.¹³⁶ The Public Welfare Department established a twenty-five percent rateable reduction¹³⁷ which caused the plaintiff's AFDC benefits to be reduced correspondingly. The plaintiff thereafter brought a class action suit alleging that the Public Welfare Department's authority to establish the rateable reduction was improperly delegated to it by the General Assembly.

The trial court agreed with plaintiff's improper delegation argument and declared the twenty-five percent rateable reduction, and its enabling statute, to be unconstitutional. On appeal, however, the supreme court disagreed and held constitutional the delegation to the

¹³⁰423 N.E.2d 293 (Ind. 1981), *rev'd* 398 N.E.2d 1321 (Ind. Ct. App. 1980).

¹³¹423 N.E.2d at 294.

¹³²429 N.E.2d 224 (Ind. 1981). For further discussion of this case see Wright, *Social Security and Welfare, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 339, 346-47 (1983).

¹³³The statutory program for AFDC recipients (Aid to Families with Dependent Children) is codified at 42 U.S.C. § 601 (1976) (incorporated by reference at IND. CODE § 12-1-2-12, -13 (1982)).

¹³⁴See IND. CODE § 12-1-7-3 (1982).

¹³⁵See IND. CODE § 12-1-2-2(d) (1982).

¹³⁶Act of Apr. 26, 1973, Pub. L. No. 339, 1973 Ind. Acts 1887, 1933.

¹³⁷470 IND. ADMIN. CODE § 2-1-6 (1979). 470 IND. ADMIN. CODE § 10-3-6(2) (1979) indicates that the rateable reduction percentage of 25% was enacted by the General Assembly, not by administrative fiat; obviously, this statement is contrary to the basis for the whole dispute in *Stanton*.

Public Welfare Department of the power to determine a rateable reduction, up to thirty-five percent.¹³⁸ In so holding, the supreme court stated the following:

The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. *Blue v. Beach*, (1900) 155 Ind. 121, 56 N.E. 89. An administrative body can be delegated the responsibility, methods, or details necessary to implement the law enacted by the Legislature. This Court has held that the Legislature may delegate authority to an administrative agency if the Legislature lays down in the same statute a reasonable standard to guide that discretion. *Kryder v. State*, (1938) 214 Ind. 419, 15 N.E.2d 386.¹³⁹

Thus, despite the fact that the authority delegated to the Public Welfare Department by the General Assembly resulted in an enormous impact upon AFDC families across the state, so long as legislative guidelines existed to check the Public Welfare Department's authority, the delegation was constitutional.

G. Enforcement of Agency Orders

Under the Indiana Administrative Adjudication Act, an administrative agency is entitled to seek equitable relief in a court of law for enforcement of its final orders.¹⁴⁰ In *City of Gary v. Stream Pollution Control Board*,¹⁴¹ the fourth district had occasion to consider one of the most oft-pleaded reasons for noncompliance with adverse agency orders—the poverty defense. The Indiana Stream Pollution Control Board and the City of Gary entered into an agreed order which established certain standards for the operation of a refuse disposal facility located in Gary. Subsequently, the Board determined that the city was not in compliance with the agreed entry and sought preliminary and permanent injunctions against the city seeking to mandate the city's adherence to the refuse disposal standards. The city's defense to the injunction proceeding was that it did not have sufficient funds from revenue sharing and local property taxes to meet the costs of complying with the Board's order, and that the city's applications to the State Tax Control Board for excessive levies¹⁴² to pay for the increased costs of operating the facility had been denied by the Tax Control Board.

¹³⁸429 N.E.2d at 229.

¹³⁹*Id.* at 228.

¹⁴⁰IND. CODE § 4-22-1-27 (1982).

¹⁴¹422 N.E.2d 312 (Ind. Ct. App. 1981), *transfer denied*, October 27, 1981.

¹⁴²*Id.* at 314-15 (citing IND. CODE § 6-3.5-1-12 (1982)).

The fourth district found that the city's financial problems were not sufficient justification for the city's admitted noncompliance with the agreed entry of the Stream Pollution Control Board and, thus, affirmed the trial court's issuance of a preliminary injunction.¹⁴³ The court placed considerable emphasis upon the environmental nature of the case; while financial hardship may affect the *timetable* for compliance with the environmental decree, the *legality* of the agreed entry was in no way impaired by the city's lack of funds.¹⁴⁴ Secondly, the court ruled that the city's financial difficulties were foreseeable at the time of the order and, therefore, were no excuse for non-compliance with the terms of the agreed entry.¹⁴⁵ Finally, the court held that the city had not exhausted all possible avenues for financing the operation of the landfill and, in particular, noted that the Solid Waste Disposal Facilities Act provided for alternative methods of financing the operation of the disposal site which the city had not yet attempted.¹⁴⁶

¹⁴³422 N.E.2d at 318.

¹⁴⁴*Id.*

¹⁴⁵*Id.* at 317.

¹⁴⁶*Id.* at 318 (citing IND. CODE §§ 19-2-1-1 to -32 (1976) (repealed 1981) (current version at *id.* §§ 36-9-30-1 to -35 (1982))). In particular, the city was statutorily authorized to issue revenue bonds, establish service charges and transfer budgets. IND. CODE §§ 19-2-1-3, -9, -10 (1976) (repealed 1981) (current version at *id.* §§ 36-9-30-3, -15, -16 (1982))).

II. Business Associations

PAUL J. GALANTI*

A. Shareholder Derivative Actions

Neese v. Richer,¹ decided during the survey period, should be of particular interest to attorneys who represent closely held corporations and to attorneys who represent minority shareholders of such corporations. In *Neese*, the court of appeals affirmed an order of the Montgomery Circuit Court that awarded attorney fees and expenses to the plaintiff, Richer, in a shareholder derivative action.² The plaintiff sought an accounting and damages, alleging mismanagement of the corporate defendant, improper recordkeeping, fraud, and conversion of corporate funds to the directors' personal use.³

The trial court had ordered an audit of the corporation's books by an independent accounting firm.⁴ Following receipt of the independent accountant's report, the trial court found that Richer had failed to prove the defendants were guilty of fraud, mismanagement, or conversion even though Richer had proven that the defendants were guilty of certain "improper" acts.⁵ However, the court then concluded that Richer had been justified in filing the suit because the defendants had failed to keep correct and complete financial books and records of account as required by the Indiana General Corporation Act,⁶ and because the defendants' dealings with the corporation "were sufficiently susceptible of an interpretation of wrongdoing."⁷ Consequently, the trial court ordered the corporation to pay Richer's expenses, the costs of the action, and the accountant's fee, even though the suit did not generate a financial recovery for the corporation.⁸

The first issue resolved on appeal was the propriety of ordering the corporation to pay for the independent accounting. Relying on *Atwood v. Prairie Village, Inc.*,⁹ the *Neese* court held that allowing

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¹428 N.E.2d 36 (Ind. Ct. App. 1981).

²*Id.* at 43.

³*Id.* at 37.

⁴*Id.* Defendants had unsuccessfully attempted to secure a writ of mandate and prohibition preventing the trial judge from acting in connection with the independent accounting order. See *State ex rel. Neese v. Montgomery Circuit Court*, 399 N.E.2d 375 (Ind. 1980).

⁵428 N.E.2d at 37.

⁶IND. CODE § 23-1-2-14 (1982).

⁷428 N.E.2d at 38.

⁸*Id.*

⁹401 N.E.2d 97 (Ind. Ct. App. 1980). The *Atwood* court in turn had relied on an earlier related Indiana Supreme Court decision, *State ex rel. Neese v. Montgomery Circuit Court*, 399 N.E.2d 375 (Ind. 1980).

costs in an equitable action, such as an accounting, is within the discretion of the trial court, and the court of appeals will not interfere unless this discretion is manifestly abused.¹⁰ In *Atwood*, it made no difference that the accountant's fee was assessed against the unsuccessful plaintiff. Clearly, this factor should not make a difference in determining who pays the accountant's fee; the main issue is which party equitably should bear the expenses. The *Neese* court was satisfied that assessing the fee against the corporation was proper in light of the trial court's "findings that the corporation's accounting procedures were sloppy, disorganized, and extremely difficult to follow"¹¹ in substantiating and reconciling the accounts and records that were available.

The message of this aspect of *Neese* is clear, unambiguous, and should be brought home to corporate clients who take a cavalier attitude toward proper bookkeeping and recordkeeping. The Indiana General Corporation Act requires corporations to keep correct and complete books of account.¹² Those that fail to comply with the statutory mandate at least face the prospect of paying for an independent audit if a minority shareholder brings a colorable, although not totally successful, action for an accounting. A much wiser course is to avoid the *Neese* problem by keeping the proper books and records.

An even more significant aspect of *Neese* is the fact that the appellate court affirmed the award of attorney fees and expenses. Indiana has long recognized the propriety of such an award where a shareholder has successfully prosecuted a derivative suit that resulted in some actual pecuniary benefit to the corporation.¹³ There are two policies for this rule: (1) shareholders who benefit from another shareholder's efforts to recover a fund for the corporation would be unjustly enriched if they did not contribute to the litigation expenses, and (2) failure to reimburse the shareholder's expenses would discourage shareholders from bringing meritorious derivative suits if the fees and expenses would exceed any potential increase in the value of their shares.¹⁴

¹⁰428 N.E.2d at 38-39.

¹¹*Id.* at 39.

¹²IND. CODE § 23-1-2-14 (1982).

¹³See *Cole Real Estate Corp. v. Peoples Bank & Trust Co.*, 160 Ind. App. 88, 310 N.E.2d 275 (1974), discussed in Galanti, *Business Associations, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 24, 35-42 (1974). See also *Princeton Coal & Mining Co. v. Gilchrist*, 51 Ind. App. 216, 99 N.E. 426 (1912). See generally authorities cited *infra* note 14.

¹⁴428 N.E.2d at 39. See generally 13 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 6044 (rev. perm. ed. 1980). Professor Hornstein's four articles on counsel fees in derivative actions are considered to be the leading commentary on the issue. See Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 COLUM. L. REV. 784 (1939); Hornstein, *Problems of Procedure in Stockholder's Derivative Suits*, 42 COLUM. L. REV. 574 (1942); Hornstein, *New Aspects of Stockholder's Derivative Suits*, 47

Defendants first argued that the award was inappropriate because Richer's suit was "not successful." This argument was summarily rejected in that the trial court specifically had found that an accounting was proper under the circumstances even though the defendants were not guilty of fraud, mismanagement, or conversion of corporate assets. Thus, Richer's suit was "successful."¹⁵

Defendant's second argument was that Richer could not recover his expenses because the corporation derived no pecuniary benefit from the suit. In rejecting this contention, the *Neese* court placed Indiana squarely among those jurisdictions that have extended the "common benefit" rule for awarding fees and expenses for cases such as: where a fund was brought within the court's control; where a fund was established from which others would benefit although without the court's control;¹⁶ and where the derivative action has produced a nonpecuniary benefit for the corporation.¹⁷

The court in *Neese* relied upon and quoted substantially from the United States Supreme Court opinion in *Mills v. Electric Auto-Lite Co.*¹⁸ to reach this result. In *Mills*, the Court affirmed an interim award of litigation expenses and reasonable fees to plaintiffs in a derivative action challenging a corporate merger under section 14(a) of the Securities Exchange Act of 1934.¹⁹ To a certain extent, *Mills* recognized a second theory for awarding fees in a derivative action. The Court stated at one point that "the stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders."²⁰ This

COLUM. L. REV. 1 (1947); Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 HARV. L. REV. 658 (1956). See also other authorities cited in W. CARY & M. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 942-43 (5th ed. unabr. 1980).

¹⁵428 N.E.2d at 39.

¹⁶See, e.g., *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939).

¹⁷428 N.E.2d at 39-40. See generally W. CARY & M. EISENBERG, *supra* note 14, at 939.

¹⁸396 U.S. 375 (1970).

¹⁹15 U.S.C. § 78n(a) (1976). There is an ironic ending to *Mills*. As noted, the fees upheld by the Court were interim fees. On remand, the district court awarded damages and prejudgment interest to the plaintiffs, but on appeal the Seventh Circuit found that the terms of the challenged merger were fair; thus, the plaintiffs could recover nothing and were not entitled to fees and expenses incurred subsequent to their victory in the Supreme Court. *Mills v. Electric Auto-Lite Co.*, 552 F.2d 1239, 1249-50 (7th Cir.), cert. denied, 434 U.S. 922 (1977). The court relied on *Alyeska* in denying fees and expenses. 552 F.2d at 1238. The plaintiffs who had won the battle thus lost the war, and those who continued the fight following the Supreme Court's decision were left to their own devices and pocketbooks. The Seventh Circuit is not totally "heartless" and recently awarded a fee of \$27,900 to an outside attorney who had done some work on *Mills* while it was before the Supreme Court. *Mills v. Electra Corp.*, 663 F.2d 760 (7th Cir. 1981) (attorney requested \$500,000).

²⁰396 U.S. at 396 (emphasis added).

second theory is that fees can be awarded where the plaintiffs were in effect "private attorney generals" helping to enforce the federal securities laws.²¹ In *Alyeska Pipeline Co. v. Wilderness Society*,²² however, the Court specifically rejected the private attorney general theory of awarding attorney fees in suits brought under federal statutes unless provided by specific statutory authorization. The Court in *Mills* did emphasize that benefits were conferred on the other shareholders by plaintiffs' suit; therefore, the *Mills* decision, which on its face is based on the common benefit theory, survives *Alyeska*.²³

As the court in *Neese* recognized, fees and expenses cannot be awarded to a plaintiff in all instances where defendants have done "some wrong," for to do so would invite the nuisance strike suit.²⁴ Such an award is only proper where the corporation receives a substantial benefit which "maintain[s] the health of the corporation and raise[s] the standards of 'fiduciary relationships and of other economic behavior'" or which 'corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect[s] the enjoyment or protection of an essential right to the stockholder's interest.'"²⁵

A court must establish a balance between the interests of the corporation and the interests of the minority shareholders. To award fees where there have been only insignificant wrongs would be unjust to the corporation, but to deny fees unless the corporation received some economic or monetary benefit could effectively foreclose minority shareholders from bringing derivative actions to correct improper corporate conduct.²⁶ The *Neese* court was satisfied that the corporation had received a substantial nonpecuniary benefit.²⁷ Albeit unlikely, the failure to keep correct and complete financial books and records could have subjected the corporation to fines.²⁸ Thus, the independent accounting ordered by the court improved the "health" of the cor-

²¹The concept of the private attorney general in part implies a cause of action for a violation of the SEC's proxy rules. See J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

²²421 U.S. 240 (1975).

²³The philosophical attitude of the Court to securities' suits had changed from 1970 to 1975, and although *Alyeska* cited *Mills* with approval, as Professors Cary and Eisenberg point out, it is open to question whether the Court would again go as far as it did in *Mills* in determining what constitutes a benefit for purposes of awarding fees under the common fund theory. W. CARY & M. EISENBERG, *supra* note 14, at 939.

²⁴428 N.E.2d at 42.

²⁵*Id.* (quoting *Bosch v. Meeker Coop. Light & Power Ass'n*, 257 Minn. 362, 364-67, 101 N.W.2d 423, 426-27 (1960)).

²⁶428 N.E.2d at 42.

²⁷*Id.*

²⁸A corporation that fails to do any act required by the Indiana General Corporations Act commits a Class B infraction, subjecting it to a possible fine. IND. CODE §§ 23-1-10-1(a), 34-4-32-4(b) (1982).

poration by bringing it in line with the requirements of the General Corporation Act.²⁹

Neese is a caveat to anyone controlling a closely held corporation who might be taking, or be tempted to take, "slight" advantage of minority shareholders. No longer can a majority shareholder test the line between the rightful exercise of control and the abuse of minority shareholder interests with the notion that the minority shareholders are unlikely to balk, that is, sue, because it would not be worth their financial while. Now, such majority shareholders must keep in mind that improper conduct, even though not fraudulent, can result in fees and expenses being assessed to the corporation. This decision means they *will* pay something for their misdeeds.

B. Creation of Limited Partnerships

Perhaps the most interesting thing about the Indiana Uniform Limited Partnership Act (I.U.L.P.A.)³⁰ is that the relevant, reported cases interpreting the I.U.L.P.A. are decided by courts in other jurisdictions.³¹ The decision of the Illinois Appellate Court in *Allen v. Amber Manor Apartments Partnership*³² is such a case. In *Allen*, the court of appeals reversed the trial court's grant of plaintiff Allen's motion for partial summary judgment in an action to determine if Allen was a limited partner in an Indiana limited partnership that owned an apartment complex in Hobart, Indiana.³³

The *Allen* court held that summary judgment was precluded in this case, because there were factual issues as to whether the parties intended to form a limited partnership and, if so, when the limited partnership was formed.³⁴ Allen became involved in the project in late 1974, when he and other investors entered into an agreement to contribute \$500,000 to the capital of the partnership.³⁵ The term "capital" is used advisedly because the agreement provided that the payments,

²⁹428 N.E.2d at 43. Although not in issue in *Neese*, Professors Cary and Eisenberg briefly describe the methods for determining fees in a successful shareholder derivative suit. W. CARY & M. EISENBERG, *supra* note 14, at 940-41; see also Mowrey, *Attorney Fees in Securities Class Action and Derivative Suits*, 3 J. CORP. L. 267 (1978). It is likely that the value of the attorney's time rather than the value of the benefit produced will be emphasized in cases involving nonpecuniary benefits because of the difficulty of quantifying such benefits. *Id.* at 316-19.

³⁰IND. CODE §§ 23-4-2-1 to -31 (1982).

³¹See, e.g., *Plaza Realty Investors v. Bailey*, 484 F. Supp. 335 (S.D.N.Y. 1979), discussed in Galanti, *Business Associations*, 1980 Survey of Recent Developments in Indiana Law, 14 IND. L. REV. 91, 101-08 (1981).

³²95 Ill. App. 3d 541, 420 N.E.2d 440 (1981).

³³*Id.* at 552, 420 N.E.2d at 448.

³⁴*Id.* at 551, 420 N.E.2d at 448.

³⁵*Id.* at 543, 420 N.E.2d at 442.

which included a loan of \$50,000 to the general partners, were to be evidenced by promissory notes.³⁶ The agreement further provided that the purported capital contributions were due and payable within thirty days following notice of the completion of the project, which notice had to be given between June 15, 1975, and January 31, 1976.³⁷

The limited partnership is a noncorporate form of business enterprise that permits persons who are limited partners to invest money without the risk of unlimited liability, which risk persons who are general partners encounter. To achieve this limited liability status, however, the limited partner must place his contribution to capital at risk.³⁸ The *Allen* court found that the contribution made by a limited partner is "limited to the contribution made by a limited partner *at the time of formation* of the partnership for the benefit of the partnership's creditors."³⁹ This finding does not mean that the actual payment has to be made in toto at the time of the formation of the partnership. Rather, it requires an absolute commitment to contribute capital to the venture and to place that contribution at risk.⁴⁰ Of course, as a general matter, this contribution is made at the outset to finance the venture. Because the limited partner's investment must be at risk, it is improper for a limited partner to take collateral to secure repayment of his investment or to guarantee a return to himself.⁴¹

A limited partnership, like a general partnership, is a contractual relationship to which contract law principles apply, subject to the formal requirements of the I.U.L.P.A. The *Allen* court recognized this truism⁴² and then further recognized that an agreement, in and of itself, will not create a partnership unless the agreement reflects the parties' mutual assent to the terms of the agreement.⁴³ Failure to agree to or to discuss an essential term of a contract may be evidence that the requisite mutual assent was lacking and that no partnership, or at least no limited partnership, in fact had been formed.

³⁶*Id.* at 543-44, 420 N.E.2d at 442-43.

³⁷*Id.* at 543-44, 420 N.E.2d at 443. This agreement also provided that the new limited partners were to be admitted to the partnership as of January 1, 1974, and specified the parties' participation in the profits and losses of the venture. *Id.*

³⁸*Id.* at 547, 420 N.E.2d at 445. See *Kramer v. McDonald's System, Inc.*, 77 Ill. 2d 323, 396 N.E.2d 504 (1979).

³⁹95 Ill. App. 3d at 547, 420 N.E.2d at 445 (emphasis added).

⁴⁰The I.U.L.P.A. provides that a limited partner is liable to the partnership: "(a) For the difference between his contribution as actually made and that stated in the certificate as having been made, and (b) for any unpaid contribution which he agreed in the certificate to make in the future at the time and on the conditions stated in the certificate." IND. CODE § 23-4-2-17 (1982).

⁴¹IND. CODE § 23-4-2-16(1) (1982).

⁴²95 Ill. App. 3d at 549, 420 N.E.2d at 446.

⁴³*Id.*

The Illinois Appellate Court concluded that there was a factual issue as to whether a partnership, in fact, had been created.⁴⁴ Defendants' position was that Allen's interests, if any, depended on the project's completion by January 31, 1976. Allen's position was that his status as a limited partner did not depend on the completion date of the project. Thus, there was a major factual issue as to whether the parties contemplated the formation of the limited partnership to occur at the time the agreement was executed or when the project was completed.⁴⁵

It is obvious that the court was not particularly sympathetic to Allen's position because it observed that Allen's interpretation of the agreement would give him the status of a limited partner while not putting his investment at risk.⁴⁶ Under Allen's approach, Allen could escape all liability if the project was not completed before January 1, 1976, which was when his obligation to contribute ended.⁴⁷ Defendants, on the other hand, argued that no limited partnership could be formed because Allen had not made a capital contribution. These differing interpretations of the agreement meant that there were triable issues, and thus summary judgment was inappropriate.⁴⁸

The decision in *Allen* emphasizes that care is needed in drafting partnership documents to ensure that the intentions of the parties purporting to create a limited partnership are specified clearly and that there is agreement on all the pertinent elements of the relationship. The intriguing question left unanswered by the *Allen* court was that if Allen had not entered into a limited partnership, what was the relationship among the parties? Presumably, Allen would be a general partner subject to unlimited liability as a member of "an association of two or more persons to carry on as co-owners a business for profit," which is the definition of a partnership under the Indiana Uniform Partnership Act.⁴⁹ Although the opinion in *Allen* does not point out the context in which the litigation arose, it is distinctly possible that the project had failed and there was potentially unlimited liability. This would explain why Allen was attempting to obtain a determination that he was a limited partner and why the partnership and the individual general partners were appealing. If Allen was a

⁴⁴*Id.* at 551, 420 N.E.2d at 448.

⁴⁵*Id.* at 549-50, 420 N.E.2d at 447.

⁴⁶*Id.* at 550, 420 N.E.2d at 447.

⁴⁷*Id.* at 549, 420 N.E.2d at 447.

⁴⁸The court was also unable to determine if the \$50,000 the new limited partners advanced to the enterprise was a loan or a contribution to the capital. It observed that it was just as reasonable to infer that the money was intended as a loan as it was to infer that it was intended as a secured capital contribution which would contravene the I.U.L.P.A. 95 Ill. App. 3d at 550-51, 420 N.E.2d at 447-48.

⁴⁹IND. CODE § 23-4-1-6(1) (1982).

general partner, the individual general partners would have the right of indemnification provided for by section 23-4-1-18(b) of the Indiana Uniform Partnership Act.⁵⁰

One point in *Allen* that is worthy of note was the court's statement that the pleadings "contain a reference that due to some failure to comply with formal requisites of Indiana partnership law . . . [three individuals] became general partners."⁵¹ These individuals entered the venture after the partnership was formed, purportedly as limited partners. Presumably, when these three individuals were admitted to the partnership, the partnership failed to comply with the I.U.L.P.A. requirement that when an additional limited partner is admitted,⁵² an amended limited partnership certificate must be filed for record in the office of the recorder of the county where the partnership's principal place of business is located.⁵³

The reason for this filing requirement is obvious. The purpose for the certificate of partnership is to give notice to third persons of the essential features of the limited partnership;⁵⁴ the purpose for the amended certificate is to ensure that public information of record is current and up to date.⁵⁵ The failure to file an amended certificate in *Allen* meant that, potentially, the three individuals were subject to unlimited liability as general partners.⁵⁶

This aspect of *Allen* is not significant to the actual case, but it should remind attorneys representing limited partnerships to ensure that all statutory requirements are satisfied to avoid the very undesirable consequence of unlimited liability to persons believing themselves to be limited partners.

C. Securities Act—Receiver

The authority of the Indiana Securities Commissioner to seek a court-appointed receiver was clarified in *State ex rel. Higbie v. Porter Circuit Court*.⁵⁷ In *Higbie*, the judgment creditors of an attorney and

⁵⁰*Id.* at § 23-4-1-18(b). See generally J. CRANE & A. BROMBERG, PARTNERSHIP § 65(b) (1968).

⁵¹95 Ill. App. 3d at 542 n.1, 420 N.E.2d at 442 n.1.

⁵²IND. CODE §§ 23-4-2-8, -24(2)(c) (1982).

⁵³*Id.* at § 23-4-2-25(5). It is possible, however, that the problem was with the form of the amended certificate because the court does note that an amended limited partnership certificate was filed with the Lake County Recorder on December 30, 1974. 95 Ill. App. 3d at 545, 420 N.E.2d at 444.

⁵⁴See *Klein v. Weiss*, 284 Md. 36, 395 A.2d 126 (1978).

⁵⁵*Id.* at 62, 395 A.2d at 141.

⁵⁶Of course, if they claimed they erroneously believed themselves to be limited partners, then they could escape unlimited liability by renouncing their interests in the profits of the business or other compensation by way of income. IND. CODE § 23-4-2-11 (1982). However, the liability of these three individuals was not in issue in *Allen*.

⁵⁷428 N.E.2d 782 (Ind. 1981).

an accountant had been thwarted in their efforts to satisfy a judgment because of a court order appointing a receiver for the debtors. It appears that in a prior action the Indiana Securities Commissioner had successfully prosecuted a suit against the debtors, charging them with violating the Indiana Securities Act.⁵⁸ As a result of this suit, the Porter Circuit Court had appointed a receiver for the debtors, individually and as partners, to prevent the debtors from "dissipating, wasting, transferring or otherwise disposing of *their* assets absent the consent of such conservator or receiver or as a result of an appropriate order to this court following a hearing to that end."⁵⁹

In an original action before the supreme court, the judgment creditors contended that the Porter Circuit Court had no jurisdiction to appoint a receiver for the assets of the individual debtors because there was no lien upon such assets in favor of the Indiana Securities Commissioner who had sought the receivership.⁶⁰

The circuit court's contention, which was accepted by the Indiana Supreme Court, was that, even though the Securities Commissioner was not a creditor, he had authority to apply for a receiver, and that the circuit court had proper jurisdiction, pursuant to section 23-2-1-17.1(a) of the Indiana Securities Act. This provision authorizes the Securities Commissioner to issue cease and desist orders against persons violating the Indiana Securities Act and further authorizes that he may "bring action in the name and on behalf of the State of Indiana . . . to enjoin that person from continuing or doing any act furthering a violation of this chapter and may obtain the appointment of a receiver or conservator."⁶¹

The Indiana Supreme Court construed section 23-2-1-17.1(a) as authorizing the appointment of a receiver, once it is clear that a violation of the Securities Act has or is about to occur.⁶² The required showing of unlawful conduct serves the same legal function as a lien or an interest in property when a creditor seeks a receiver for a debtor,⁶³ because the violation establishes the state's interest in the violators' property, which has a nexus to their business conduct.

To require a lien before a receiver can be appointed would not only contradict the express statutory language of the Securities Act, but would also severely hamper the effective enforcement of the Securities Act. Seizing and preserving the assets of a violator would ensure "that justice be done between the violator and the investor, and that public confidence be maintained in the effectiveness of the

⁵⁸IND. CODE §§ 23-2-1-1 to -24 (1982).

⁵⁹428 N.E.2d at 783 (emphasis added).

⁶⁰*Id.* See *McKain v. Rigsby*, 250 Ind. 438, 237 N.E.2d 99 (1968).

⁶¹IND. CODE § 23-2-1-17.1(a) (1982).

⁶²428 N.E.2d at 783.

⁶³*Id.* at 784.

government regulation of the securities industry."⁶⁴ It would not be at all surprising if persons engaging in improper securities transactions kept poor, if any, books and records and commingled individual assets with "business" assets. Construing section 23-2-17.1(a) restrictively, by permitting individual creditors access to individual assets before malefactors' affairs are straightened out, would clearly thwart the interests that are to be protected by the Indiana Securities Act.

Section 23-2-1-17.1 of the Indiana Securities Act is patterned after and similar to section 408 of the Uniform Securities Act.⁶⁵ Although the language differs, both the Indiana Act and the Uniform Act clearly intend to authorize the appointment of a receiver where the receiver will facilitate enforcement of the act and will protect the interests of the investor.⁶⁶ In fact, the importance of a receiver in enforcing securities laws had led two commentators to posit that language such as "in addition to any other remedies" may be sufficient to infer statutory authority for the appointment of a receiver in securities cases in those states that do not expressly authorize the enforcement agency to do so.⁶⁷

Although the language of section 23-2-1-17.1 of the Indiana Securities Act appears, on its face, to be clear, the supreme court's decision in *Higbie* resolves any doubts as to the Securities Commissioner's authority to seek a receiver.

D. Indiana Takeover Offers Act

The Indiana Takeover Offers Act⁶⁸ was at issue before the Indiana Court of Appeals in *In re CTS Corp.*⁶⁹ Unlike most suits involving

⁶⁴*Id.*

⁶⁵UNIF. SECURITIES ACT § 408, 7A U.L.A. 663 (1958). The Indiana provision is taken in part from section 408, which pertains to injunctive relief, and in part from section 407, which authorizes the agency enforcing the Act to conduct investigations and issue subpoenas. *Id.* at 660.

⁶⁶Surprisingly, there are not many reported cases under the Uniform Securities Act or similar legislation involving the appointment of a receiver. See *Commonwealth v. Ramco Petroleum, Inc.*, 3 BLUE SKY L. REP. (CCH) ¶ 71,525 (Mass. Sup. Ct. 1980); *Commonwealth ex rel. Pennsylvania Sec. Comm'n v. Allamanda Inv. Co.*, 388 A.2d 1141 (Pa. Commw. Ct. 1978). Of course, authority for the appointment of a receiver does not automatically mean one will be appointed. See *Pennsylvania Sec. Comm'n v. Continental Mfg. Co.*, 465 Pa. 411, 350 A.2d 831 (1976) (proper to refuse to appoint a receiver where defendants agreed to cease questioned transactions until a final determination if such transactions constituted a sale of securities).

⁶⁷See 11C H. SOWARDS & N. HIRSCH, BUSINESS ORGANIZATIONS—BLUE SKY REGULATION § 10.05[2] (1982).

⁶⁸IND. CODE §§ 23-2-3.1-0.5 to -11 (1982). The Takeover Offers Act is discussed in Galanti, *Corporations, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 133, 161-72 (1980).

⁶⁹428 N.E.2d 794 (Ind. Ct. App. 1981).

takeover statutes,⁷⁰ the litigation in *CTS* was not a challenge by a tender offeror who was frustrated by a state takeover act. Instead, *CTS* was an appeal by the target company, *CTS*, from a determination by the Indiana Securities Commissioner that the offeror, Dynamics Corporations of America (DCA), had not engaged in any act or practice violating the Takeover Offers Act.⁷¹ *CTS* contended that the Securities Commissioner's conclusion was not supported by the evidence and was contrary to law. In addition, *CTS* claimed that the Securities Commissioner had erred in refusing to reopen the record to receive additional evidence.⁷²

The Securities Commissioner initially issued an ex parte cease and desist order against DCA but vacated the order after the Seventh Circuit's decision in *City Investing Co. v. Simcox*,⁷³ which had held that ex parte orders were specifically prohibited by the Takeover Offers Act. Then, at a contested hearing, *CTS* sought to establish that a brokerage firm buying relatively large blocks of *CTS* stock for DCA was engaged in a creeping tender offer, which was in violation of the Takeover Offers Act. The Securities Commissioner rejected that contention and subsequently refused to reopen the proceeding to receive "newly discovered evidence" because it found that *CTS*'s evidence was cumulative and not "newly" discovered. Relying on the provisions of the Takeover Offers Act pertaining to appeals,⁷⁴ and the provisions of the Indiana Administrative Adjudication Act pertaining to the admission of newly discovered evidence,⁷⁵ the *CTS* court refused to reweigh the evidence and concluded that the Securities Commissioner did not err in denying *CTS*'s request to reopen the record.⁷⁶

On the issue of whether DCA had made a tender offer, the Securities Commissioner clearly had followed the approach taken in *City Investing* and had looked to cases under the Williams Act amend-

⁷⁰See, e.g., *City Investing Co. v. Simcox*, 476 F. Supp. 112 (S.D. Ind. 1979), aff'd, 633 F.2d 56 (7th Cir. 1980), discussed in Galanti, *supra* note 31, at 112-17; *In re City Investing Co.*, 411 N.E.2d 420 (Ind. Ct. App. 1980), discussed in Galanti, *Business Associations*, 1981 Survey of Recent Developments in Indiana Law, 15 IND. L. REV. 31, 39-47 (1982).

⁷¹428 N.E.2d at 795.

⁷²*Id.*

⁷³633 F.2d 56, 58 (7th Cir. 1980).

⁷⁴IND. CODE § 23-2-3-11 (1982). The court actually referred to section 23-2-3-11 in the Indiana Business Takeover Act; however, that provision was repealed when the Indiana Takeover Offers Act was enacted in 1979 and before DCA started acquiring *CTS* shares. 428 N.E.2d at 802.

⁷⁵IND. CODE § 4-22-1-15 (1982). The evidence must be discovered after the hearing. Also, there is a presumption that newly discovered evidence might have been discovered in time to be used at trial. See *Shaw v. Shaw*, 159 Ind. App. 33, 304 N.E.2d 536 (1973); *Kelly v. Bunch*, 153 Ind. App. 407, 287 N.E.2d 586 (1972).

⁷⁶428 N.E.2d at 802.

ments to the Securities Exchange Act of 1934⁷⁷ to determine what constituted a tender offer. The courts in the Williams Act cases have looked at eight factors, which focus on the presence or absence of the substantive evils that the Williams Act was intended to prevent, in order to decide whether a tender offer has been made. The primary evil seems to be pressuring shareholders to make uninformed, ill considered decisions to tender their shares.⁷⁸

Although some courts⁷⁹ and commentators⁸⁰ have criticized this approach, it was accepted in *City Investing*. Thus, on appeal, the court in *CTS* was not willing to disturb the Securities Commissioner's finding that five of the eight commonly used criteria indicated there was no tender offer and that these five factors outweighed the three factors which tended to show there was a tender offer.⁸¹

Although not argued by the parties, the *CTS* court observed that the Securities Commissioner could have relied on sections 23-2-3-1(i)(1) and (6), which give him the discretion to determine that certain acquisitions did not constitute takeover offers.⁸² Presumably, these provisions were not argued because they were repealed in 1979 when the current Indiana Takeover Offers Act was adopted, and there are no comparable provisions in the current Takeover Offers Act. Also, the offeror had not acquired *CTS* shares until after the previous Takeover Offers Act was repealed.

Of course, the most interesting aspect of the Takeover Offers Act that was not considered by the *CTS* court was its constitutionality. The Takeover Offers Act had been upheld in *City Investing Co. v. Simcox*,⁸³ but the recent decision of the United States Supreme Court in *Edgar v. Mite Corp.*⁸⁴ raises considerable doubt as to the viability of the Indiana Act as well as to similar statutes in other states. The Court in *Edgar* held that the Illinois Business Takeover Act⁸⁵ was un-

⁷⁷15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976).

⁷⁸428 N.E.2d at 799-800. See generally Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250 (1973).

⁷⁹428 N.E.2d at 800. See, e.g., *Brascan Ltd. v. Edper Equities Ltd.*, 477 F. Supp. 773 (S.D.N.Y. 1979).

⁸⁰See Note, *Private Solicitations Under the Williams Act*, 66 CORNELL L. REV. 361 (1981).

⁸¹428 N.E.2d at 801. The court was unwilling to disturb the Securities Commissioner's decision because it was supported by the evidence, see *City of Mishawaka v. Stewart*, 261 Ind. 670, 310 N.E.2d 65 (1974), and because it is inappropriate for a court to substitute its judgment for that of the Securities Commissioner who is charged with enforcing the Takeover Offers Act. See *Department of Financial Inst. v. Colonial Bank & Trust Co.*, 176 Ind. App. 368, 375 N.E.2d 285 (1978).

⁸²428 N.E.2d at 798 n.2.

⁸³476 F. Supp. 112 (S.D. Ind. 1979), *aff'd*, 633 F.2d 56 (7th Cir. 1980).

⁸⁴102 S. Ct. 2629 (1982).

⁸⁵The Illinois Business Take-Over Act, ILL. REV. STAT. ch. 121½, ¶¶ 137.51 to .70 (Supp. 1982).

constitutional because it imposed an undue burden on interstate commerce.⁸⁶

It is, of course, possible that state takeover statutes can be drafted so that the statute will not impose a "substantial burden" on interstate commerce, but it may not be worthwhile. For example, the Takeover Offers Act currently exempts from the filing requirements⁸⁷ "an acquisition of equity securities of a target company having seventy-five (75) or fewer holders of record of equity securities at the time of the takeover offer."⁸⁸ If a state can regulate only tender offers for corporations in which the majority of shareholders are residents, it is interesting to wonder how many Indiana corporations exist with more than seventy-five shareholders, most of whom live in this state.

E. Corporate Service of Process

A financing corporation's attempt to insulate itself from the judicial process failed in *General Finance Corp. v. Skinner*,⁸⁹ a suit to recover benefits under a credit disability insurance policy that was purchased by the plaintiff, Skinner, when she refinanced a loan from General Finance Corporation of Indiana (GFC of Indiana), a subsidiary of the defendant, General Finance Corporation (GFC). In *Skinner*, GFC appealed from the Vigo Superior Court's denial of GFC's motion for relief from a default judgment. The motion had alleged insufficient service of process. A summons and complaint against GFC had been served by registered mail addressed to CT Corporation Systems, which was the agent of GFC of Indiana but not GFC's resident agent.⁹⁰ In other words, the subsidiary which had made the loan was served, but not the parent corporation which was being sued.

In *Skinner*, the court of appeals upheld the service on GFC, thus joining those jurisdictions which recognize that in appropriate circumstances the separate corporate existence of parent and subsidiary will be ignored, and service of process on one will be sufficient to acquire jurisdiction over an out-of-state parent or subsidiary.⁹¹ The effectiveness of service of process on one corporation in obtaining

⁸⁶102 S. Ct. at 2643.

⁸⁷IND. CODE §§ 23-2-3.1-3 to -5 (1982).

⁸⁸*Id.* at § 23-2-3.1-8.6(a)(3).

⁸⁹426 N.E.2d 77 (Ind. Ct. App. 1981).

⁹⁰426 N.E.2d at 79.

⁹¹See authorities cited 426 N.E.2d at 84. See also *Frazier v. Alabama Motor Club, Inc.*, 349 F.2d 456 (5th Cir. 1965); *Empire Steel Corp. v. Superior Court*, 56 Cal. 2d 823, 366 P.2d 502 (1961); *Taca Int'l Airlines S.A. v. Rolls Royce Ltd.*, 15 N.Y.2d 97, 256 N.Y.S.2d 129, 204 N.E.2d 329 (1965); *Comprehensive Sports Planning, Inc. v. Pleasant Valley Country Club*, 73 Misc. 2d 477, 341 N.Y.S.2d 914 (1973). See generally Wellborn, *Subsidiary Corporations in New York: When is Mere Ownership Enough to Establish Jurisdiction over the Parent*, 22 BUFFALO L. REV. 681 (1973).

jurisdiction over a parent or subsidiary depends on whether the affairs of the affiliated corporations are so commingled as to make the two impossible to separate; however, service of process on one will not suffice to obtain jurisdiction over the other, if their affairs are kept separate.⁹²

The mere fact that GFC of Indiana is a wholly owned subsidiary of GFC does not support jurisdiction over the parent by service on the subsidiary, because similar names or common ownership of stock alone will not suffice.⁹³ However, as the *Skinner* court noted, the relationship between GFC and GFC of Indiana went further. The two corporations had common officers, and the corporate counsel for both GFC and GFC of Indiana was the same person.⁹⁴ More important to the conclusion that the two corporations were actually one was the evidence set forth by the court, which included: the loans initiated by GFC of Indiana and by other GFC subsidiaries in twenty-five states were made from a common checking account in a Chicago bank; employees of GFC of Indiana and other subsidiaries were paid from that account by GFC; a computer terminal transmitted transactions to the GFC home office in Illinois which did all the subsidiary's accounting; letterheads and telephone listings referred to General Finance Corporation rather than General Finance Corporation of Indiana; GFC's advertising emphasized over 400 General Finance and General Finance Corporation offices from coast to coast where one could deal with "friendly Bob Adams"; financing statements showed GFC as the secured party; and forty-five lawsuits brought in Vigo County to collect defaulted loans were filed in GFC's name.⁹⁵

The court was satisfied that although there were "two separate corporate entities on paper, only one commonly-owned enterprise" existed.⁹⁶ The separate existence of GFC of Indiana could be disregarded because it was so organized and controlled in its affairs that

⁹²See *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). See also *Botwinick v. Credit Exchange, Inc.*, 419 Pa. 65, 213 A.2d 349 (1965) (activities of subsidiary which carefully maintained its separate corporate existence, not those out-of-state parent for purposes of service of process).

⁹³See *Botwinick v. Credit Exchange, Inc.*, 419 Pa. 65, 72, 213 A.2d 349, 353-54 (1965).

⁹⁴426 N.E.2d at 79. Normally common officers or directors will not warrant disregard of corporate existence. See *Merriman v. Standard Grocery Co.*, 143 Ind. App. 654, 242 N.E.2d 128 (1968). However, it is a factor to be considered.

The *Skinner* court noted that GFC is wholly owned by CNA Financial Corporation, a financial conglomerate which directly or indirectly controlled sixty or more other substantial corporations, and that CNA in turn was controlled by Loews Corporation. 426 N.E.2d at 79. The reason for this reference is unclear because the size of the overall enterprise is completely irrelevant in determining whether a parent and subsidiary are one and the same.

⁹⁵426 N.E.2d at 79-81.

⁹⁶*Id.* at 82.

it was, in effect, a division of GFC.⁹⁷ Consequently, service on the registered agent of GFC of Indiana was service on a lawfully appointed agent of GFC within the meaning of Indiana Trial Rule 4.6(A)(1);⁹⁸ therefore, the entry of a default judgment against GFC was appropriate. Although default judgments are not favored because they are rendered without trial, a trial court has considerable discretion in this area, and a default judgment will be reversed only upon a showing of a clear abuse of discretion.⁹⁹ Certainly, a person is entitled to have a default judgment set aside if he has not been served with process and thus had no notice of the proceeding,¹⁰⁰ but GFC did have notice.¹⁰¹

The *Skinner* result is obviously correct. If the parent and subsidiary are held separate, service on one should not be service on the other. If, however, a large enterprise structures its operations through myriad subsidiaries in a "complex and interrelated manner so as to prevent ascertainment of exactly which corporate entity"¹⁰² is responsible, the corporation should not be surprised if the corporate fiction is ignored and service on one "part" of the enterprise is deemed service on another part.¹⁰³ A business enterprise that is deliberately set up in a complex fashion should not expect the public with whom it deals to wend through a corporate labyrinth at their peril if they should happen to select the wrong "path."

F. Buy-Sell Agreements and Irrevocable Proxies

Attorneys representing small, closely held corporations should note

⁹⁷See *Merriman v. Standard Grocery Co.*, 143 Ind. App. 654, 242 N.E.2d 128 (1968); *Feucht v. Real Silk Hosiery Mills, Inc.*, 105 Ind. App. 405, 12 N.E.2d 1019 (1938).

⁹⁸IND. R. TR. P. 4.6(A)(1). *Skinner* did not have to serve the Indiana Secretary of State, as the acting agent for GFC as a foreign corporation not admitted to do business, pursuant to IND. CODE § 23-3-3-1 (1982), because an actual agent of GFC was served. Thus, the constitutionally imposed requirement that service reasonably inform the parties of the nature of the proceeding was satisfied, even though the return of the summons and complaint by GFC of Indiana's registered agent did in fact, as GFC argued, notify *Skinner* that an alternative method of service could have been utilized.

⁹⁹See *Erdman v. White*, 411 N.E.2d 653 (Ind. Ct. App. 1980); *Green v. Karol*, 168 Ind. App. 467, 344 N.E.2d 106 (1976).

¹⁰⁰See *Keiling v. McIntire*, 408 N.E.2d 565 (Ind. Ct. App. 1980).

¹⁰¹426 N.E.2d at 86. On rehearing, the court emphasized that GFC and GFC of Indiana constituted only one entity. Since it was never disputed in *Skinner* that C.T. Corporation was the resident agent of GFC of Indiana, the court on rehearing also distinguished cases questioning whether the person served was an authorized agent. 431 N.E.2d 526 (Ind. Ct. App. 1982).

¹⁰²*Merriman v. Standard Grocery Co.*, 143 Ind. App. 654, 657, 242 N.E.2d 128, 130 (1968).

¹⁰³Courts are perhaps somewhat more inclined to disregard the corporate fiction when the issue is service of process than when the issue is imposing liability on, for example, a parent corporation for the torts or contracts of a subsidiary. See generally H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS § 151 (2d ed. 1970).

*Williams v. Williams (Williams II).*¹⁰⁴ The court of appeals in *Williams II* affirmed a Boone Circuit Court order that denied plaintiff Mildred Williams' motion for preliminary injunction in an action brought against Howard Williams to compel him to call and to hold an annual meeting of W & W, Inc. Howard owned fifty percent of the shares of W & W, and Mildred's husband had owned the balance prior to his death.¹⁰⁵ The shares were subject to a buy-sell agreement that provided that W & W would purchase the shares of a deceased shareholder and that gave "the surviving natural party . . . a special power of attorney to vote such shares until the transfer [of stock to the corporation had been] completed."¹⁰⁶ Thus, the buy-sell agreement expressly stated that the surviving shareholder, rather than the personal representative of the deceased shareholder, should vote the stock until the transfer was completed.¹⁰⁷

The corporation eventually petitioned for an order directing Mildred, as executrix, to perform the buy-sell agreement. In that action, *In re Estate of Williams (Williams I)*,¹⁰⁸ Mildred prevailed because the claim was not filed within the time specified in the Indiana Probate Code. The court in *Williams I*, however, expressly acknowledged that under the probate code the buy-sell agreement could be enforced against the heirs or the devisees who succeeded to the decedent's interest in the shares.¹⁰⁹ Because the refusal to enforce the buy-sell agreement in *Williams I* was procedural and not on the merits, the *Williams II* court held that the present action was not barred under the doctrine of res judicata.¹¹⁰

Because the buy-sell agreement could still be enforced, the court noted that Mildred would not suffer irreparable harm if a preliminary injunction ordering a shareholders' meeting was denied. Although Mildred owned fifty percent of the corporation's stock, the buy-sell agreement gave Howard a proxy to vote Mildred's shares, so that, even if Howard called a meeting of W & W shareholders, he could vote her shares. Therefore, an order compelling Howard to call a meeting would be a futile gesture. There was no problem with the duration of the proxy exceeding eleven months because the proxy

¹⁰⁴427 N.E.2d 727 (Ind. Ct. App. 1981). For further discussion of this case, see Falender, *Trusts and Decedents' Estates, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 415, 419 (1983).

¹⁰⁵427 N.E.2d at 728-29.

¹⁰⁶*Id.* at 728.

¹⁰⁷*Id.*

¹⁰⁸398 N.E.2d 1368 (Ind. Ct. App. 1980), discussed in Falender, *Decedents' Estates and Trusts, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 291, 298-301 (1981).

¹⁰⁹427 N.E.2d at 729 (citing *In re Estate of Williams*, 398 N.E.2d at 1371).

¹¹⁰427 N.E.2d at 730-31.

was in writing and complied with the Indiana General Corporation Act.¹¹¹ Furthermore, the proxy was irrevocable as a result of the buy-sell agreement which gave Howard an interest in the shares.¹¹²

Of course, it is possible that the dispute has not yet been resolved. Mildred contended that the buy-sell agreement was merely an option to sell and that W & W had an obligation to purchase only if she chose to sell; whereas, W & W and Howard claimed that the buy-sell agreement provided that Mildred had a duty to sell. The court noted that the proper construction of the buy-sell agreement was not in issue before the court.¹¹³ Thus, it is possible that we may see *Williams III*.¹¹⁴

G. Definitions of a Security

A case involving securities regulation that is worthy of note is *Canfield v. Rapp & Son, Inc.*,¹¹⁵ in which the Court of Appeals for the Seventh Circuit affirmed a judgment of the District Court for the Southern District of Indiana. The district court held that Rapp had failed to establish any of the material elements for recovery under either federal or state securities law or common law fraud.¹¹⁶ The essential issue on appeal was whether Rapp's purchase of all shares of Twigg Corporation from Canfield and two others was a sale of a "security" within the meaning of the securities laws. Relying on its earlier decision in *Frederiksen v. Poloway*,¹¹⁷ the appellate court held that the purchase of the shares ancillary to the acquisition and assumption of control of Twigg was not a transaction involving "securities" and, therefore, could not give rise to a cause of action under any of the following statutory laws:¹¹⁸ rule 10b-5¹¹⁹ promulgated under the

¹¹¹IND. CODE § 23-1-2-9(e) (1982).

¹¹²427 N.E.2d at 731. See *State ex rel. Breger v. Rusche*, 219 Ind. 559, 39 N.E.2d 433 (1942). See also *Calumet Indus., Inc. v. MacClure*, 464 F. Supp. 19 (N.D. Ill. 1978) (determining the irrevocability of consent agreements by comparing them with proxy arrangements). See generally 5 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2062 (rev. perm. ed. 1976 & Supp. 1982).

¹¹³427 N.E.2d at 730 n.2.

¹¹⁴*Williams I* and *Williams II* appear to be examples of the all too common family disputes involving closely held corporations, which are a bane to families but a boon to attorneys. For an example of this problem, see *Galler v. Galler*, 45 Ill. App. 2d 452, 196 N.E.2d 5, aff'd in part, rev'd in part, 32 Ill. 2d 16, 203 N.E.2d 577 (1964), appeal dismissed, 69 Ill. App. 2d 397, 217 N.E.2d 111 (1966), appeal on other grounds, aff'd, 95 Ill. App. 2d 340, 238 N.E.2d 274 (1968), modified upon denial reh'g, 21 Ill. App. 3d 811, 316 N.E.2d 114 (1974), aff'd, 61 Ill. 2d 464, 336 N.E.2d 886 (1975).

¹¹⁵654 F.2d 459 (7th Cir. 1981).

¹¹⁶*Id.* at 460.

¹¹⁷637 F.2d 1147 (7th Cir.), cert. denied, 451 U.S. 1017 (1981).

¹¹⁸654 F.2d at 462-63.

¹¹⁹17 C.F.R. § 240.10b-5 (1982).

Securities Exchange Act of 1934;¹²⁰ section 17(a) of the Securities Act of 1933;¹²¹ or the anti-fraud provision of the Indiana Securities Law.¹²² This result was reached notwithstanding the fact that the transaction was a "stock sale" within the literal meaning of the term "security" as defined in the three statutes.¹²³ The appellate court found that, in essence, the transaction was a commercial purchase and sale of Twigg that was effectuated through the purchase of shares, which served only as an indicia of ownership.¹²⁴

The underlying rationale for *Canfield* and *Frederiksen* is the Seventh Circuit's interpretation of the United States Supreme Court decision in *United Housing Foundation, Inc. v. Forman*.¹²⁵ The Seventh Circuit reads *Forman* as imposing an economic reality test in deciding when a particular "instrument" is a security. This test, according to the *Canfield* court, consists of three elements: (1) an investment in a common venture; (2) premised on a reasonable expectation of profit; (3) to be derived from the entrepreneurial or managerial efforts of others.¹²⁶ The court concluded that Rapp's purchase failed to satisfy the first element because there was no sharing or pooling of funds with others and also failed the third element because Rapp took over the management, control, and operation of Twigg.

Rapp attempted to distinguish *Frederiksen* on the ground that the economic reality test does not apply if a transaction involves "stock" with all the attributes of ordinary common stock. Rapp relied upon *Coffin v. Polishing Machines, Inc.*¹²⁷ in which the economic reality test was applied only after the court decided that the shares under consideration were not ordinary capital stock. Although there is language in *Forman* that the name given to an instrument is not wholly irrelevant to its status, the *Canfield* court rejected *Coffin* because of the

¹²⁰15 U.S.C. § 78j(b) (1976).

¹²¹*Id.* § 77q(a).

¹²²IND. CODE § 23-2-1-12 (1982).

¹²³The definition of the term "security" in the Securities Act of 1933, 15 U.S.C. § 77(b) (1976), the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(10), and the Indiana Securities Act, IND. CODE § 23-2-1-1(k) (1982) are functionally equivalent. See *American Fletcher Mortgage Co. v. U.S. Steel Credit Corp.*, 635 F.2d 1247 (7th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

¹²⁴654 F.2d at 463.

¹²⁵421 U.S. 837 (1975) ("shares of stock" necessary to obtain subsidized low income housing, which shares could not be pledged or encumbered and did not possess voting rights, and which in effect represented a tenant's deposit not securities within the meaning of the federal securities laws).

¹²⁶654 F.2d at 463. This test is derived from *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

¹²⁷596 F.2d 1202 (4th Cir.), *cert. denied*, 444 U.S. 868 (1979). The court also refused to distinguish *Frederiksen* because in both *Canfield* and *Frederiksen* a business was purchased and the assets rather than the stock were sold.

necessity of looking beyond the form of the instrument to decide whether in reality it is a security.¹²⁸

However, in a 1982 decision, *Golden v. Garafalo*, a panel of the Court of Appeals for the Second Circuit expressly rejected the *Frederiksen* interpretation of *Forman* and held that the sale of all the stock of a corporation, even in connection with a transfer of business ownership, was a sale of a security.¹²⁹ The panel, like the court in *Coffin*, reasoned that the economic reality test was appropriate only when courts were considering "unusual or unique" instruments governed by the statutory phrase "investment contract." An example of the "unusual or unique" would be the "stock" in the cooperative housing project involved in *Forman* or the unique, one on one, negotiated certificate of deposit which was held not to be a security in *Marine Bank v. Weaver*.¹³⁰ Thus, although the *Canfield-Frederiksen* sale of business doctrine has been relied upon in a growing number of cases,¹³¹ the *Golden* court was not willing to narrowly define the term "security" so that, in effect, the federal securities acts are substantially repealed.

One of the problems with the *Canfield-Frederiksen* approach is that it really goes beyond *Forman*. Although the Seventh Circuit's position might reflect what appears to be the current hostility of the Supreme Court to the federal securities laws,¹³² there is a tendency to forget that the Supreme Court has recognized that the definition of security that is contained in the federal acts, and, in effect, the Indiana Securities Act, should be read broadly.¹³³ As the Second Cir-

¹²⁸654 F.2d at 464-65.

¹²⁹678 F.2d 1139 (2d Cir. 1982). Judge Lumbard, dissenting in *Golden*, took the position that the two-part approach of *Forman* was necessitated because there were alternative grounds for the Second Circuit's holding that the cooperative apartment "stock" was a security. Consequently, Judge Lumbard thought that a finding that an instrument possesses the common characteristics of corporate stock does not foreclose an inquiry into the economic reality of the transaction. *Id.* at 1147 (Lumbard, J., dissenting).

¹³⁰455 U.S. 551 (1982).

¹³¹See, e.g., *Reprosystem v. SCM Corp.*, 522 F. Supp. 1257 (S.D.N.Y. 1981); *Oakhill Cemetery of Hammond, Inc. v. Tri-State Bank*, 513 F. Supp. 885 (N.D. Ill. 1981); *Zilker v. Klein*, 510 F. Supp. 1070 (N.D. Ill. 1981); *Anchor-Darling Indus., Inc. v. Suozzo*, 510 F. Supp. 659 (E.D. Pa. 1981); *Barsy v. Verin*, 508 F. Supp. 952 (N.D. Ill. 1981); *Dueker v. Turner*, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,386 (N.D. Ga. 1979); *Bula v. Mansfield*, [1979 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,964 (D. Colo. 1977); *Tech Resources, Inc. v. Estate of Hubbard*, 246 Ga. 583, 272 S.E.2d 314 (1980).

¹³²See, e.g., *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977); *Piper v. Chris-Craft Indus., Inc.* 430 U.S. 1 (1977); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232 (1976); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582 (1973); *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418 (1972).

¹³³See *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946). There is even a tendency to forget that the "instruments" in *Howey*, which were maintenance agreements

cuit said in *Golden v. Garafalo*,¹³⁴ there would be little reason for the statutory drafters "to use words such as 'stock,' 'treasury stock' or 'voting—trust certificate,' unless their intention was to include all such instruments as commonly defined."¹³⁵ References to specific types of instruments and common variations would have been inappropriate if an economic reality test were intended to apply across the board, because many instruments would be excluded from these categories by a definition that looked only to economic reality. In fact, if economic reality were Congress's intent, there would be no reason to mention specific types of securities, and thus a general catch-all term such as "investment contracts" would have sufficed.¹³⁶ However, this issue was not discussed by the court in either *Canfield* or *Frederiksen*; in addition, the court, in both cases, simply rejected the "literal application" argument.¹³⁷

Another problem with the *Canfield-Frederiksen* doctrine is that, although many transactions involving corporate shares are not really securities cases, the doctrine goes too far and insulates transactions that are truly securities cases from scrutiny under the appropriate statutes enacted to protect investors. For example, in *Oakhill Cemetery of Hammond, Inc. v. Tri-State Bank*,¹³⁸ where a new manager had purchased a controlling block of stock but less than 100% of the outstanding shares, the federal district court used the doctrine to take the transaction outside the scope of the securities law.¹³⁹ *Oakhill* is consistent with *Canfield-Frederiksen* because the purchase was a "commercial" transaction to the manager and the purchaser was going to manage the enterprise. Therefore, the third element of the economic reality test could not be satisfied. Of course, this approach ignores the possibility that a purchaser of a business might regard himself

connected with the purchase of trees in a citrus grove, were found to be securities. *Id.* at 295, 299-300.

¹³⁴678 F.2d 1139 (2d Cir. 1982).

¹³⁵*Id.* at 1144.

¹³⁶See *id.*

¹³⁷*Canfield v. Rapp & Son, Inc.*, 654 F.2d 459, 465 (7th Cir. 1981); *Frederiksen v. Poloway*, 637 F.2d 1147, 1150-52 (7th Cir.), cert. denied, 451 U.S. 1017 (1981). See generally Comment, *Acquisition of Business through Purchase of Corporate Stock: An Argument for Exclusion from Federal Securities Regulation*, 8 FLA. ST. U.L. REV. 295 (1980).

¹³⁸513 F. Supp. 885 (N.D. Ill. 1981). The *Oakhill* approach is not without its supporters. See generally Seldin, *When Stock is not a Security: The "Sale of Business" Doctrine Under the Federal Securities Laws*, 37 BUS. LAW 637 (1982); Thompson, *The Shrinking Definition of a Security: Why Purchasing All of a Company's Stock is Not a Federal Security Transaction*, 57 N.Y.U. L. REV. 225 (1982).

¹³⁹513 F. Supp. at 888. *Oakhill* involved an alleged violation of the federal securities laws, Indiana common law, and, for some reason, a violation of the section of the Indiana Securities Act concerning the registration of brokers, investment advisors, and agents. See IND. CODE § 23-2-1-11 (1982).

both as an investor hoping to realize an appreciation in the stock, as well as an entrepreneur receiving compensation for operating the business.¹⁴⁰

The *Canfield-Frederiksen* approach also presents the potential anomalous result that "investors" may buy some of the stock of a business and hence would be entitled to protection under the securities laws, but if the managers buy the balance they would not be entitled to recover under the securities laws, although the managers may be just as defrauded as the former group. If the managers get a "free ride," that is, the stock is a security because of the presence of the investors, then the entire concept behind the "sale of business" doctrine collapses. However, if it is found that the managers did not purchase "securities," which the logical application of *Canfield-Frederiksen* would mandate, a grave injustice will result because they will be treated differently than their equally defrauded "investor" co-purchasers. After all, not everyone who purchases a business is in a position to protect their investment because they may not be knowledgeable about the business they are acquiring.¹⁴¹

Of course, the immediate answer is that anyone who has purchased a business as a result of fraud can always sue for fraud. But then again, in *Canfield*, Rapp sued for fraud and was unsuccessful because he had "failed to prove any of the essential elements of fraud—misrepresentation, scienter, reliance, causation, and damages."¹⁴²

In *Canfield*, the Seventh Circuit purported to interpret the definition of a security in the Indiana Securities Act. The decision, however, is not binding on Indiana courts. One may hope that, when faced with the question whether a sale of a business effected through the sale of stock is subject to the Indiana Securities Act, an Indiana court would consider the reasoning of the majority opinion in *Golden*, and not simply accept the *Canfield-Frederiksen* sale of business doctrine as the proper interpretation of the law. Fraud is fraud, and if it can be prevented or deterred by the literal language of the Indiana Securities Act, the literal interpretation should be honored. Courts that adopt the sale of business doctrine appear to be judicially repealing the securities laws in the guise of interpreting them. If these statutes are not to apply to closely held corporations, or to situations

¹⁴⁰See *Golden v. Garafalo*, 678 F.2d 1139 (2d Cir. 1982).

¹⁴¹The ability of a purchaser of a company to protect his investment is often given as a reason for narrowly defining a "security." See generally Hannan & Thomas, *The Importance of Economic Reality and Risk in Defining Federal Securities*, 25 HASTINGS L.J. 219 (1974).

¹⁴²654 F.2d at 466. The only evidence of "fraud" introduced by Rapp related to future events, and a fraud action requires statements of fact relating to existing or past events, not future events. See *Royal Business Mach., Inc. v. Lorraine Corp.*, 633 F.2d 34 (7th Cir. 1980).

where an entire business is purchased because the purchaser should be able to fend for himself, then it seems more appropriate for the legislature to decide that the statutes do not apply.¹⁴³

H. Statutory Developments

The first statutory development that would be of interest to those involved with business associations law during the survey period was the enactment of Public Law 142,¹⁴⁴ which amended section 23-1-2-11(h)¹⁴⁵ of the Indiana General Corporation Act. This section now permits the use of conference calls for board of directors' meetings or for meetings of committees designated by a corporate board, by providing that participation in a meeting by means of a conference telephone or similar communication equipment that allows all persons participating in the meeting to communicate with each other constitutes "presence in person at the meeting."¹⁴⁶ The power to hold such telephonic meetings, however, may be restricted or prohibited in a corporation's articles or bylaws.¹⁴⁷ Amended section 23-1-2-11(h) is similar to section 43 of the Model Business Corporation Act¹⁴⁸ and to the corporations acts of numerous states.¹⁴⁹

This is a worthwhile amendment to the Indiana General Corporation Act. As pointed out in the comment on a proposed amendment to section 43 of the Model Act, "[t]elecommunications equipment has been so improved that conference calls can be speedily arranged and amplifying facilities activated wherever there is need."¹⁵⁰ There is certainly no reason to deny the benefits of modern communication systems to boards of directors when so much of the ordinary business of corporations is carried on by such means. Furthermore, because the Indiana General Corporation Act specifically permits a board or committee to take action without a meeting, if prior written consent is given,¹⁵¹ it is senseless not to authorize the use of modern equipment to permit directors who are unable to attend a meeting in person to participate.

¹⁴³In some jurisdictions, this has been done. See, e.g., ILL. REV. STAT. ch. 121½, § 137.4(o) (1979).

¹⁴⁴Act of Feb. 24, 1982, Pub. L. No. 142, 1982 Ind. Acts 1050.

¹⁴⁵IND. CODE § 23-1-2-11(h) (1982).

¹⁴⁶*Id.*

¹⁴⁷*Id.*

¹⁴⁸MODEL BUSINESS CORP. ACT § 43 (2d ed. Supp. 1977) [hereinafter cited as MODEL ACT]. Section 43 was amended in 1974 to authorize conference calls. See *Changes in the Model Business Corporation Act*, 29 BUS. LAW. 947, 948 (1974).

¹⁴⁹See MODEL ACT, *supra* note 148, ¶ 3, at 338-41.

¹⁵⁰*Proposed Change in the Model Business Corporation Act Amending Section 43 to Permit the Holding of Meetings of Directors and Committees by Electronic Communication*, 28 BUS. LAW. 979, 980 (1973).

¹⁵¹IND. CODE § 23-1-2-11(i) (1982).

Many early cases striking down informal actions by directors¹⁵² were predicated on the theory that deliberative, collegial decision-making was the reason why the control and management of the affairs of a corporation were vested in the board of directors. The physical absence of the director also explains, to some extent, cases prohibiting directors from voting by proxy.¹⁵³ If the objective of a board meeting is to allow the interchange of ideas through group discussion and deliberation, then it is logical to authorize the use of modern technology which will, in fact, facilitate such collegial decisionmaking. Now directors who cannot physically attend meetings can "reach out" and participate.¹⁵⁴

Statutory authorization of telephonic meetings was probably necessary. There is always the possibility that any informal action which is not done in accordance with statutory provisions may be held invalid.¹⁵⁵ There is some common law authority that a director is *not* present at a meeting if he participates in the meeting by means of a telephone call because meeting means "the coming together of two or more persons face to face so as to be in each other's presence or company."¹⁵⁶

The General Assembly also amended Indiana insurance law to permit telephonic meetings of directors of Indiana insurance companies.¹⁵⁷ Interestingly, the General Assembly did not amend sec-

¹⁵²See, e.g., Schuckman v. Rubenstein, 164 F.2d 952 (6th Cir. 1947), cert. denied, 333 U.S. 875 (1948); Baldwin v. Canfield, 26 Minn. 43, 1 N.W. 261 (1879); Audenried v. East Coast Milling Co., 68 N.J. Eq. 450, 59 A. 577 (1904). Of course, the general rule was often subject to the standard exceptions of estoppel, ratification, or acquiescence. See generally 1 G. HORNSTEIN, CORPORATION LAW & PRACTICE § 412, at 507-08 (1959).

¹⁵³See, e.g., Dowdle v. Central Brick Co., 206 Ind. 242, 189 N.E. 145 (1934). See also Greenberg v. Harrison, 143 Conn. 519, 124 A.2d 216 (1956) (directors must give deliberative control and cannot vote by proxy); Lippman v. Kehoe Stenograph Co., 11 Del. Ch. 80, 95 A. 895 (1915) (the personal judgment of the director is important and he cannot vote by proxy).

¹⁵⁴This is particularly true in situations where the presence of a director is needed to satisfy quorum or voting requirements, or for a corporation with greater than normal quorum and voting requirements where the absence of a director may preclude speedy action, even though all directors are in agreement but the requisite consents cannot be signed prior to the action.

Of course, the use of electronic communications also will be helpful to large corporations with many widespread directors because the cost of equipment or user charges will be far less than the cost of transporting the directors to one meeting place.

¹⁵⁵See H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS § 208 (2d ed. 1970).

¹⁵⁶Re Associated Color Laboratories, Ltd., [1970] 12 D.L.R. 3d 338, 343 (B.C. Sup. Ct. chambers).

¹⁵⁷Act of Feb. 18, 1982, Pub. L. No. 161, 1982 Ind. Acts 1219 (amending IND. CODE § 27-1-7-10(g) (1982)). This Act also added a new provision authorizing directors of insurance companies to act without meetings by means of prior written consents. *Id.* at 1221 (codified at IND. CODE § 27-1-7-10(h) (1982)). The language differs from the In-

tion 23-7-1.1-10 of the Indiana Not-for-Profit Corporation Act¹⁵⁸ to permit telephonic meetings of the directors of Indiana not-for-profit corporations. It is difficult to determine if this omission was deliberate or an oversight. Arguably, boards of not-for-profit corporations, or at least small ones such as neighborhood civic leagues, should meet in person to maintain the closeness of the organization. On the other hand, there seems to be no reason to deny the *right* to conduct telephonic meetings to not-for-profit corporations if the members so desire. The Not-for-Profit Corporation Act does permit informal action without a meeting by the use of consents,¹⁵⁹ and nothing would preclude restricting or prohibiting telephonic meetings in the articles or by-laws of a not-for-profit corporation.

Another significant enactment in the business area was Public Law 143,¹⁶⁰ which amended section 23-1-2-13 of the Indiana General Corporation Act¹⁶¹ by eliminating the prohibition against the same person performing the duties of the president and secretary of an Indiana general corporation. As the Act now stands, if the corporation's by-laws so provide, the same person can hold two or more offices in a corporation, including the office of president and the office of secretary. By eliminating the prohibition, the General Assembly brought the General Corporation Act in line with the three major Indiana professional corporation acts which have permitted the same person to serve as both president and a secretary of a professional corporation since 1973.¹⁶²

The prohibition was a particular problem for professional corporations because the acts prohibit nonprofessionals from serving as officers, directors, or shareholders. It does not necessarily follow, however, that permitting the same person to serve as both president and secretary of a general corporation is desirable. Admittedly, it appears that unless barred by statute, articles, or by-laws, the common law permitted a person to hold several corporate offices, including president and secretary.¹⁶³ Many statutes, however, including the

diana General Corporations Act, IND. CODE § 23-1-2-11(i) (1982), but the effect of the two provisions will be the same.

¹⁵⁸IND. CODE § 23-7-1.1-10 (1982).

¹⁵⁹*Id.*

¹⁶⁰Act of Feb. 24, 1982, Pub. L. No. 143, 1982 Ind. Acts 1054.

¹⁶¹IND. CODE § 23-1-2-13(a) (1982).

¹⁶²General Professional Corporation Act, IND. CODE §§ 23-1-13-1 to -12 (1982); Professional Medical Corporation Act, IND. CODE §§ 23-1-14-1 to -22 (1982); and the Professional Dental Corporation Act, IND. CODE §§ 23-1-15-1 to -22 (1982). See generally Galanti, *Corporations, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 77, 109-12 (1973).

¹⁶³See *President & Directors of the Manhattan Co. v. Kaldenberg*, 165 N.Y. 1, 58 N.E. 790 (1900) (same person may simultaneously occupy the offices of president and de facto secretary and in such capacities may execute a document requiring authen-

Model Act,¹⁶⁴ prohibited this. There is no conceptual difficulty with one person wearing the proverbial "two hats," but it probably is better to have two different individuals sign corporate documents or instruments, which have to be acknowledged or verified by two officers as an analogue to governmental checks and balances.

To some extent that rationale was undercut in 1981 when the General Assembly amended both Indiana corporation acts to permit "any current officer" to sign documents instead of requiring two signatures.¹⁶⁵ By reducing the role of the secretary, the General Assembly essentially eliminated any reason for having two individuals serve in the two capacities.

This development raises an interesting question—why require a corporation to have a secretary?¹⁶⁶ The General Assembly simply could eliminate the position and provide that any document, such as a resolution of the board of directors, could be certified by any officer.¹⁶⁷ If the Indiana General Corporation Act has eliminated the need for a secretary, the issue arises as to how persons in other states dealing with Indiana corporations will react to documents signed by the same person acting as both president and secretary, not to mention documents executed by only one officer. It is not inconceivable that Indiana attorneys may find themselves explaining Indiana law to nonresidents. Certainly this author would proceed with caution, if he were in another state and were presented with a corporate document that was executed by a person as president and attested to by the same individual as secretary. A likely concern would be whether the arrangement, in fact, was permitted under Indiana law.

Although there may be arguments against the trend, even a traditionalist such as this author must admit that the prolifera-

tication of the president and secretary). See also *Collins v. Tracy Grill & Bar Corp.*, 144 Pa. Super. 440, 19 A.2d 617 (1941). See generally 6 Z. CAVITCH, BUSINESS ORGANIZATIONS § 128.01 [2] (1982); 1 G. HORNSTEIN, CORPORATION LAW & PRACTICE § 512 (1959); 2 MODEL ACT, *supra* note 148, § 50, ¶ 3.02.

¹⁶⁴2 MODEL ACT, *supra* note 148, § 50. Section 18 of the proposed Statutory Closed Corporations Supplement to the Model Business Corporation Act does authorize an individual holding more than one office in a statutory closed corporation to "execute, acknowledge, or verify in more than one capacity." *A Report of the Committee on Corporate Laws, Proposed Statutory Close Corporation Supplement to the Model Business Corporation Act*, 37 BUS. L.W. 269, 307 (1981).

¹⁶⁵See IND. CODE §§ 23-1-2-5, -4-5, -5-2(f), -5-3(e), -5-8, -7-1.1-42(e) (1982). See generally 1981 Survey, *supra* note 70, at 62-63.

¹⁶⁶See IND. CODE § 23-1-2-13 (1982).

¹⁶⁷The best proof of corporate authority is the original records of the corporation or a certificate duly authenticated by a responsible officer. The importance of the secretary's certification and the presence of a corporate seal cannot be overestimated because it creates a presumption that the instrument was duly authorized by the board of directors. *In re Drive-in Development Corp.*, 371 F.2d 215 (7th Cir.), cert. denied sub nom., 387 U.S. 909 (1966).

tion of one person corporations probably favors this development. Two caveats, however, are warranted. The first is that the requirement of section 23-1-2-13, which provides that two or more offices may be held by the same person if the by-laws so provide, has not changed, and, in the absence of such a provision, different individuals must serve as the three statutorily mandated offices. The second is that, whenever corporate procedures are simplified, persons involved with closely held corporations may become careless in complying with the remaining statutory requirements, and that result increases the possibility that the corporate veil will be pierced and personal liability imposed.¹⁶⁸

In 1981, the General Assembly imposed a requirement that the annual reports of all corporations contain "a statement of whether the corporation is the holder of any funds or other property, tangible or intangible, which may be presumed abandoned pursuant to the provisions"¹⁶⁹ of the Indiana Uniform Disposition of Unclaimed Property Act.¹⁷⁰ In 1982, those requirements were repealed by Public Law 144.¹⁷¹ Presumably, Indiana businesses are not unhappy to have a burdensome reporting requirement eliminated, but Indiana taxpayers, in a year when the State avoided a deficit only by holding up income tax refunds, might question the wisdom of vitiating the mechanism for enforcing the Unclaimed Property Act, which is a source of revenue for the state common school fund. The amounts collected under this Act are not insignificant. In 1980, almost two million dollars was collected by the Unclaimed Property Division of the Attorney General's Office.¹⁷²

One statutory development of particular interest to attorneys representing clients whose businesses depend on commercially valuable but nonpublic information is Public Law 145,¹⁷³ which adopted the

¹⁶⁸Public Law 143 also simplified the process of dissolving a corporation before it commences business by amending section 23-1-7-1(a) of the General Corporation Act to eliminate the requirement that such dissolution be done by a majority of incorporators and to permit such dissolution pursuant to a petition signed by any current officer of the corporation and affirmed subject to penalties for perjury. IND. CODE § 23-1-7-1(a) (1982). The procedures for the voluntary dissolution of a corporation that has begun business were not changed in substance, but there were some style changes. *Id.*

¹⁶⁹IND. CODE §§ 23-1-8-1(7), -1-11-7(14), -3-4-1(a) (7), -7-1.1-36(m) (1982).

¹⁷⁰*Id.* at §§ 32-9-1-1 to -45 (1982).

¹⁷¹Act of Feb. 25, 1982, Pub. L. No. 144, 1982 Ind. Acts 1060 (codified at IND. CODE § 23-1-8-1 (1982)). Public Law 144 also amended the Uniform Disposition of Unclaimed Property Act so businesses do not have to file reports with the Unclaimed Property Division of the Attorney General's Office that they do not hold any property presumed abandoned unless requested in writing by the Attorney General or his representative. IND. CODE § 32-9-1-15(f) (1982).

¹⁷²1980 Op. Att'y Gen. xlvi-xlvii.

¹⁷³Act of Feb. 25, 1982, Pub. L. No. 145, 1982 Ind. Acts 1070. The Act is codified at IND. CODE §§ 24-2-3-1 to -8 (1982).

Uniform Trade Secrets Act.¹⁷⁴ The Uniform Trade Secrets Act was approved and recommended for enactment by the National Conference of Commissioners on Uniform State Laws in 1979, after a more than ten-year gestation period.¹⁷⁵

A trade secrets act is a very significant development. A valid patent provides a legal monopoly for seventeen years in exchange for public disclosure of an invention, but if a patent is subsequently declared invalid, there is disclosure of the invention without the protective legal monopoly. Furthermore, many processes or devices will not qualify for patent protection because they are not an "invention," because the process, formula, or device will have a useful life far exceeding the seventeen-year monopoly provided by the patent statute, or because other technical reasons exist.¹⁷⁶

Consequently, many businesses elect to protect commercially valuable information through reliance on state trade secret law. Although the status of trade secret law was uncertain for some time under the federal preemption doctrine,¹⁷⁷ the Supreme Court definitively ruled in *Kewanee Oil Co. v. Bicron Corp.*¹⁷⁸ that neither the patent and the copyright clause of the Constitution¹⁷⁹ nor the federal patent act¹⁸⁰ preempts state trade secret law for protection of patentable or unpatentable devices or information.

The Prefatory Note to the Uniform Trade Secrets Act points out that trade secret law has not developed satisfactorily notwithstanding its commercial importance.¹⁸¹ The Commissioners point out that there is a lack of authority in many jurisdictions and, even in those jurisdictions with significant trade secret litigation, there are uncertainties concerning the extent of trade secret protection and the appropriate remedies for misappropriation of a trade secret.¹⁸² Another important

¹⁷⁴UNIFORM TRADE SECRETS ACT §§ 1-12, 14 U.L.A. 541-51 (1980) [hereinafter cited as UNIFORM ACT].

¹⁷⁵*Id.* at 538-40.

¹⁷⁶See, e.g., 35 U.S.C. § 102(b) (1976) (provides that a person is not entitled to a patent if the invention was in public use or on sale in the United States more than one year prior to the date of the application for the patent).

¹⁷⁷See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compeo Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

¹⁷⁸416 U.S. 470 (1964). *Kewanee* was recently reaffirmed in *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979), where the Court held that federal patent law did not preclude a contract obligating a party to pay a continuing royalty in exchange for the disclosure of a trade secret for which no patent was issued. *Id.* at 265-66. Even though the contract was upheld in *Aronson*, it has been established that a provision in a patent license agreement providing for royalties beyond the expiration date of the patent is not enforceable. *Brulotte v. Thys Co.*, 379 U.S. 29 (1964).

¹⁷⁹U.S. CONST. art. I, § 8, cl. 8.

¹⁸⁰35 U.S.C. §§ 1-376 (1976).

¹⁸¹UNIFORM ACT, *supra* note 174, at 537.

¹⁸²*Id.*

reason for a specific trade secret statute is that the provisions in the First Restatement of Torts, which was the most frequently cited authority in the development of trade secret law,¹⁸³ were deleted in the second edition of the Restatement published in 1979.¹⁸⁴

A need for uniformity in trade secret law also prompted the Uniform Act. Even those states with a well developed body of trade secret law do not necessarily have uniform laws. This could become a problem as the importance of trade secret protection increases for businesses operating in many different states.

For example, Indiana courts have long prohibited former employees from using trade secrets of employers where there was an understanding that the trade secrets would not be utilized after the employment relationship ended,¹⁸⁵ but the perimeters of the law were ill-defined. Indiana, like most jurisdictions, has criminal sanctions for the improper acquisition of trade secrets.¹⁸⁶ However, criminal sanctions may not provide practical or adequate protection to the owner of a trade secret.

Thus, the adoption of the Uniform Trade Secret Act in Indiana is an important step in protecting legitimate business interests. It is impossible to discuss fully the Indiana Uniform Trade Secrets Act in a survey article, so only the highlights will be noted. The first observation that can be made about the Indiana Uniform Trade Secrets Act is that it, in fact, is not uniform. However, this lack of uniformity is in the form rather than in the substance of the Indiana Act. For some reason, the General Assembly enacted section 9 (short title)¹⁸⁷ and section 8 (uniformity of application and construction)¹⁸⁸ of the Uniform Act as sections 1(a) and 1(b) of the Indiana statute.¹⁸⁹ Further-

¹⁸³See RESTATEMENT OF TORTS §§ 757-59 (1939).

¹⁸⁴The American Law Institute took the position that because trade regulation law in general had developed into an independent body of law which was no longer based primarily upon tort principles, it was no longer appropriate to include those principles in the Restatement. RESTATEMENT (SECOND) OF TORTS introductory note (Vol. 4 1965). See generally Klitzke, *The Uniform Trade Secrets Act*, 64 MARQ. L. REV. 277, 282-84 (1980). See also Note, *Trade Secrets, Customer Contacts and the Employer-Employee Relationship*, 37 IND. L.J. 218, 220-28 (1962).

¹⁸⁵See Westervelt v. National Paper & Supply Co., 154 Ind. 673, 57 N.E. 552 (1900). See also Koehring Co. v. National Automatic Tool Co., 257 F. Supp. 282 (S.D. Ind. 1966), aff'd, 385 F.2d 414 (7th Cir. 1967); Donahue v. Permacel Tape Corp., 234 Ind. 398, 127 N.E.2d 235 (1955). See generally Note, *Trade Secrets, Customer Contacts and the Employer-Employee Relationship*, 37 IND. L.J. 218, 220-28 (1962).

¹⁸⁶See IND. CODE §§ 35-42-5-1, -43-4-2, -43-4-3 (1982). 12A R. MILGRAM, BUSINESS ORGANIZATIONS: TRADE SECRETS App. B-1 (1981) contains a list of states with similar criminal sanctions.

¹⁸⁷UNIFORM ACT, *supra* note 174, § 9.

¹⁸⁸*Id.* § 8.

¹⁸⁹IND. CODE § 24-2-3-1(a)-(b) (1982).

more, although section 7 of the Uniform Act displaces "conflicting tort, restitutionary, and other law pertaining to civil liability for misappropriation of a trade secret" except for "(1) contractual or other civil liability or relief that is not based upon misappropriation of a trade secret; or (2) criminal liability for misappropriation of a trade secret,"¹⁹⁰ the comparable Indiana provision displaces all conflicting law pertaining to the misappropriation of trade secrets, except contract law and criminal law.¹⁹¹ Thus, both acts preserve contractually imposed duties relating to secret information, such as covenants not to compete, but only the Uniform Act preserves duties imposed by principles of agency law.¹⁹² Indiana's failure to preserve agency duties is questionable because it is not inconceivable that a court would rule that the legislature's decision to omit the language preserving agency principles demonstrates a legislative intent to repeal such law. Hopefully, no court would construe section 1(c) as repealing any principle of agency law and would treat the omission as the elimination of surplusage because section 7 of the Uniform Act displaces only *conflicting* law, and certainly there is no law requiring an agent to act in a disloyal fashion.

Another possible problem with the Indiana Act is that the Uniform Act's severability provision¹⁹³ was omitted. If the omission of the severability clause was a deliberate legislative decision, then it is probable that the General Assembly intended the Indiana Act not to be severable. Consequently, if any provision of the Indiana Act or its application to any person or circumstances were held invalid, the invalidity might also affect the application of other provisions which could be given effect despite the invalid provision.¹⁹⁴ This legislative decision is inexplicable.

Other than these differences, the Indiana Act generally tracks the Uniform Act, although the section numbers differ.¹⁹⁵ The Indiana Act applies to a "trade secret," which is broadly defined as information with actual or potential independent economic value resulting from its secrecy where there have been reasonable efforts to maintain the

¹⁹⁰UNIFORM ACT, *supra* note 174, § 7.

¹⁹¹IND. CODE § 24-2-3-1(c) (1982).

¹⁹²See UNIFORM ACT, *supra* note 174, § 7 commissioners' comment, at 550.

¹⁹³UNIFORM ACT, *supra* note 174, § 10.

¹⁹⁴The absence of a severability clause creates a presumption that the statute is to be upheld completely or not at all. *Indiana Educ. Employment Relations Bd. v. Benton Community School Corp.*, 266 Ind. 491, 510, 365 N.E.2d 752, 762 (1977). Of course, the General Assembly could have been relying on the general severability clause in the Indiana Code, IND. CODE § 1-1-1-8 (1982), but the omission does raise an issue. See generally 2 D. SANDS, STATUTES & STATUTORY CONSTRUCTION §§ 44.03-04.11 (4th ed. 1972).

¹⁹⁵Because sections 7-9 of the Uniform Act were adopted, in part, in section 1 of the Indiana Act, the section numbers of the two acts are off by one. Thus, section 1 of the Uniform Act is section 2 of the Indiana Act.

secrecy.¹⁹⁶ It provides relief for actual or threatened misappropriation of a trade secret. The Indiana Act defines the term "misappropriation" as the "acquisition of a trade secret by a person who knows or has reason to know that the trade secret was acquired by improper means"¹⁹⁷ or the disclosure or use of a trade secret of another without consent.¹⁹⁸ One effect of this broad definition of trade secret is that business information is now clearly treated the same as technical trade secrets; whereas, there was some uncertainty and confusion under the common law.¹⁹⁹

The Indiana Act provides a legal remedy only where there has been a misappropriation, but it makes no difference whether the misappropriation is contractual, tortious, or criminal. This is a decided improvement over the common law, where the misappropriation of a trade secret could be treated only as a contractual or a tortious action.²⁰⁰ The most important remedy under the Indiana Act is injunctive relief.²⁰¹ The statute permits an injunction before there has been any attempt to use or disclose a trade secret. An example would be when a terminated employee is attempting to take trade secret documents. This type of remedy, of course, is very desirable from the standpoint of the employer. The Indiana Act, however, rejects the practice of some courts that grant punitive, perpetual injunctions against someone who has misappropriated a trade secret. Instead, the Indiana Act provides that an injunction should be no longer than a trade secret's life, plus any additional time necessary to negate any "lead time" or commercial advantage obtained through the misappropriation.²⁰² Thus, the injunctive relief lasts as long as, but no longer than, necessary to protect the trade secret.²⁰³

Section 24-2-3-4(a) of the new Indiana Act permits recovery of damages in addition to, or in lieu of, injunctive relief,²⁰⁴ although it appears that no double recovery would be permitted for a misappropriation.²⁰⁵ Recovery for unjust enrichment is also authorized, but only

¹⁹⁶IND. CODE § 24-2-3-2(4) (1982).

¹⁹⁷Improper means is defined to include "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means." IND. CODE § 24-2-3-2(i) (1982).

¹⁹⁸IND. CODE §§ 24-2-3-2(2)(i)-(ii) (1982).

¹⁹⁹See generally Klitzke, *supra* note 184, at 287-88.

²⁰⁰The distinction between tortious or contractual misappropriation may have been significant at common law because of different statutes of limitation. *Id.* at 296, n.93.

²⁰¹See IND. CODE § 24-2-3-3 (1982).

²⁰²*Id.* § 24-2-3-3(a).

²⁰³See UNIFORM ACT, *supra* note 174, § 2 commissioners' comment, at 544.

²⁰⁴IND. CODE § 24-2-3-4(a) (1982). Double damages may be awarded for a willful and malicious misappropriation. *Id.* § 24-2-3-4(b) (1982).

²⁰⁵See UNIFORM ACT, *supra* note 174, § 3 commissioners' comment; Klitzke, *supra* note

to the extent that unjust enrichment is not taken into account in computing damages for actual loss.²⁰⁶

Section 24-2-3-3²⁰⁷ departs slightly from its counterpart in the Uniform Act. The latter provides that, where the court has determined it would be unreasonable to prohibit future use, an injunction may condition future use upon the payment of a reasonable royalty for the period of time that the use could have been prohibited.²⁰⁸ Under the Indiana Act, an injunction conditioning future use upon payment of a reasonable royalty is limited to "exceptional circumstances," where the court has determined that it would be unreasonable to prohibit future use.²⁰⁹ Both Acts allow a court to award reasonable attorney fees to a prevailing party in specified circumstances.²¹⁰

Of course, an attempt to protect a trade secret would be futile if meritorious litigation would result in the disclosure of the trade secret. Consequently, the Indiana Act authorizes a court, in appropriate circumstances, to order affirmative acts to protect a trade secret.²¹¹ In addition, the Indiana Act authorizes a court to fashion safeguards that preserve the confidentiality of a trade secret during a trial, yet permit a defendant sufficient information to present a defense and permit the trier of fact sufficient information to resolve the dispute on the merits.²¹²

One of the problems with the common law protection of trade secrets was whether the contract or tort statute of limitations applied to a misappropriation of a trade secret.²¹³ Furthermore, there is a split of authority on when the statute begins to run, some courts holding that each day's use of a trade secret constituted a new and discreet "continuing wrong," others holding that the date of the first use of a trade secret started the running of the statute.²¹⁴ The latter line

184, at 304-05. Of course, still to be resolved is whether the Commissioners' Comments will be taken into account in interpreting the Uniform Act, but presumably they will.

²⁰⁶IND. CODE § 24-2-3-4(a) (1982). The practice of some courts is to award damages for actual loss and for unjust enrichment. *See, e.g.*, Telex Corp. v. International Business Mach. Corp., 510 F.2d 894 (10th Cir.), cert. dismissed, 423 U.S. 802 (1975). This practice was rejected by the Commissioners. UNIFORM ACT, *supra* note 174, § 3, at 547.

²⁰⁷IND. CODE § 24-2-3-3 (1982).

²⁰⁸UNIFORM ACT, *supra* note 174, § 2(b), at 544.

²⁰⁹IND. CODE § 24-2-3-3(c) (1982). Reasonable royalties can be required for no longer than the period during which the use could have been prohibited when neither damages nor unjust enrichment are provable. *Id.* § 24-2-3-3(b).

²¹⁰*Id.* § 24-2-3-5; UNIFORM ACT, *supra* note 174, § 4. Reasonable attorney fees may be awarded where a specious claim of misappropriation has been made, or where there has been a specious effort to terminate an injunction, or where there has been a willful and malicious misappropriation.

²¹¹IND. CODE § 24-2-3-3(d) (1982).

²¹²*Id.* § 24-2-3-6. *See generally* UNIFORM ACT, *supra* note 174, § 5 commissioners' comment, at 548-49.

²¹³*See generally* Klitzke, *supra* note 184, at 306-07.

²¹⁴*Id.* at 307-08.

of cases obviously shorten the period for which a plaintiff can recover for a misappropriation.

The Indiana Act²¹⁵ takes a compromise position. It specifically provides for a three-year statute of limitations and provides that a continuing misappropriation constitutes a single claim. It further provides that the statute does not begin to run until an aggrieved person discovers, or reasonably should have discovered, the existence of the misappropriation. The statutory solution clarifies the date when the statute begins to run but avoids the inequitable results that could occur if the first-use theory is applied mechanically when there is some time before the owner realizes there has been a misappropriation.²¹⁶

The Uniform Act as adopted in Indiana is a definite advancement in the protection of innovative business ideas. Both patent and trade secret law provide a basis for protecting ideas, but unlike patent law, which is a federal statutory law, trade secret protection was a common law doctrine with many flaws caused by a lack of uniformity and piecemeal development.²¹⁷ Thus, the common law development of trade secret protection has been limited and to some degree ineffective. Now that it is settled that state trade secret law is not preempted by federal patent law, the states should develop an effective doctrine. The Uniform Trade Secret Act provides such a doctrine. Furthermore, the Indiana Act should be of help to Indiana businesses because it is possible that possessors of trade secrets may not have known that the law afforded a remedy for misappropriation. This problem should no longer exist in Indiana.

²¹⁵IND. CODE § 24-2-3-7 (1982). This provision is based on section 6 of the Uniform Act, UNIFORM ACT, *supra* note 174, § 6.

²¹⁶IND. CODE § 24-2-3-8 (1982) provides that the Act does not apply to the part of a continuing misappropriation otherwise covered by the Act which began before September 1, 1982, but it does apply to that part which occurs after August 31, 1982, unless the appropriation was not a misappropriation under displaced Indiana common law. This provision differs from section 11 of the Uniform Act, UNIFORM ACT, *supra* note 174, § 11, which simply states that the Act does not apply to misappropriations occurring prior to the effective date.

Hopefully not too many trade secret misappropriations are occurring in Indiana because apportioning the misappropriation under section 24-2-3-8 and the application of the displaced Indiana common law presents some mindboggling prospects.

²¹⁷See generally Klitzke, *supra* note 184, at 309.

III. Civil Procedure and Jurisdiction

WILLIAM F. HARVEY*

A. Introduction

This Survey Article is limited to a discussion of those cases and amendments to trial rules that proved the most significant in the survey period reviewed. During the survey period, the Indiana courts decided important cases concerning Indiana's long arm statute, service of process, and Trial Rules 59 and 60. In addition, several of the trial rules pertaining to discovery were amended to coincide with the federal trial rules. These amendments, however, did not substantially alter existing Indiana case law. The Indiana Supreme Court also amended Trial Rules 6, 41, 52, 60.5, 75, and 79. The amended rules became effective January 1, 1982 and are supported by explanatory committee notes.

B. Jurisdiction, Process, and Venue

1. *Trial Rule 4.4: "Long Arm" Jurisdiction.*—During the survey period, the Indiana Court of Appeals decided two Trial Rule 4.4 cases of importance. Additionally, the decision of the United States Supreme Court in *City of Milwaukee v. Illinois*¹ has a significant effect on Indiana's long arm jurisdiction. In *City of Milwaukee*, the Court sustained an assertion of jurisdiction² under the Illinois long arm statute.³ The jurisdictional assertion occurred when Illinois alleged that sewage, containing disease-causing viruses and bacteria, was being transported by water currents from the city and county of Milwaukee into parts of Lake Michigan, and that the sewage disposal affected the shores of Illinois. At trial, the defendants argued that there was no "tortious act within" the State of Illinois as that phrase is used in the Illinois long arm statute.⁴ The Court of Appeals for the Seventh Circuit held that the tort was committed in the place where the injury occurred, and that it seemed beyond dispute that injury to the plaintiff occurred in Illinois.⁵ Therefore, the appellate court stated that it was fair and reasonable to require the defendants to defend in Illinois because each year the defendants placed millions of gallons of sewage in Lake

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¹451 U.S. 304 (1981).

²*Id.* at 312 n.5 (agreeing with the court of appeals that contacts with Illinois were sufficient to give personal jurisdiction over the defendant).

³Civil Practice Act, ILL. REV. STAT. ch. 110, § 17 (1982).

⁴*State of Illinois v. City of Milwaukee*, 599 F.2d 151, 155 (7th Cir. 1979).

⁵*Id.* at 156.

Michigan.⁶ The Supreme Court expressly affirmed this conclusion and held that under the circumstances it was fair and reasonable to require the defendants to defend their conduct in the federal forum in Illinois.⁷

The decision in *City of Milwaukee* is significant for Indiana law because Indiana's long arm statute, Trial Rule 4.4(A)(2), is similar to the Illinois statute. Under Trial Rule 4.4(A)(2), Indiana does not require that business be done or conducted in the state for jurisdiction to exist.⁸ For that matter, *International Shoe Co. v. Washington*⁹ does not make that requirement either, as taught by *City of Milwaukee* and the reference to *International Shoe* in that opinion by Mr. Justice Rehnquist.¹⁰ Instead, the question becomes whether the conduct causing personal injury or property damage by an act or omission /done in Indiana makes it reasonable to call the defendant to account in Indiana courts. In *City of Milwaukee*, there was no intent and no anticipated result on the part of the defendants to cause injury in Illinois. There was no planned activity in Illinois; the Wisconsin defendants did not make a formal entry into Illinois, and no business of any kind was done or performed there. Nevertheless, the conduct outside of the state that had a sustained impact in Illinois generated jurisdiction in Illinois.¹¹

Understanding this important determination in *City of Milwaukee*, the two Indiana decisions concerning personal jurisdiction thus become even more significant. In *Griese-Traylor Corp. v. Lemmons*,¹² the defendant corporation, who had contracted with the plaintiff to purchase the plaintiff's business and entire capital stock, appealed a judgment awarding the plaintiff damages for breach of the contract. The defendant challenged the court's jurisdiction, based upon its interpretation of the term "doing business" in Indiana Trial Rule 4.4(A)(1), by asserting that the corporation did not do any business in Indiana. Evidence indicated that the defendant was incorporated in Florida and maintained its principal place of business there, that its resident agent was in Florida, that the defendant transacted no business in Indiana and was not qualified or registered to do so, and that the defendant did not hire or retain employees or solicit business in Indiana. The

⁶*Id.*

⁷451 U.S. at 312 n.5.

⁸IND. R. TR. P. 4.4(A)(2). Rule 4.4(A)(2) confers jurisdiction on the court when a person commits an act "causing personal injury or property damage by an act or omission done within this state." *Id.*

⁹326 U.S. 310 (1945).

¹⁰See 451 U.S. at 312 n.5.

¹¹*Id.*

¹²424 N.E.2d 173 (Ind. Ct. App. 1981). See *Townsend, Secured Transactions, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 315, 321 (1983).

defendant's only involvement in Indiana was the execution of the sale and purchase contract.

The issue on appeal was whether this "single transaction" would qualify under the Trial Rule 4.4 provision "doing business." In a lengthy opinion, the court of appeals canvassed United States Supreme Court decisions,¹³ and the court in *Griese-Traylor* found that the single transaction fell within Trial Rule 4.4 and that there were no due process or statutory law violations.¹⁴

The court determined that the defendant corporation had availed itself of the privilege of doing business in Indiana through one of its corporate officers who had negotiated and facilitated the execution of the contract for the sale and purchase of an Indiana corporation from Indiana residents. Additionally, the contract provided that the stock transfer, payment, and consulting services would occur in Indiana, and that all contract provisions were governed by Indiana law. Given these facts, the court affirmed the trial court's exercise of *in personam* jurisdiction over the defendant corporation.¹⁵

A second case involving Trial Rule 4.4, and discussed by the court in *Griese-Traylor*,¹⁶ is *Suyemasa v. Myers*.¹⁷ Much like the *Griese-Traylor* facts, the latter action arose from a breach of contract for the sale of the capital stock of a foreign corporation to Indiana residents. In *Suyemasa*, however, the plaintiffs were appealing a dismissal on the grounds of lack of personal jurisdiction. The nonresident defendant seller argued that he was not "doing business" in the state within the meaning of Trial Rule 4.4(A)(1), because he had no office in Indiana nor was he in the business of selling or transferring stock or stock subscriptions within the state. The defendant, a Tennessee resident, further asserted that the making of the contract did not satisfy the minimum contacts requirement of *International Shoe Co. v. Washington*.¹⁸ The court of appeals held that the defendant's acts of discussing the stock transfers with the plaintiffs and of ultimately negotiating the sales contract, all done in Indiana, were sufficient to satisfy any jurisdictional assertion.¹⁹

The *Suyemasa* court also discussed the burden of proof in a party's

¹³World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹⁴424 N.E.2d at 181.

¹⁵*Id.*

¹⁶*Id.* at 180.

¹⁷420 N.E.2d 1334 (Ind. Ct. App. 1981).

¹⁸326 U.S. 310 (1945) (allowing a court to exercise jurisdiction over a nonresident defendant if the party has such minimum contact with the state that maintenance of the suit complies with traditional notions of fair play).

¹⁹420 N.E.2d at 1342.

challenge to the jurisdiction of the trial court. Where a party raises a jurisdictional challenge in either a Trial Rule 8(C) pleading or in a Trial Rule 12(B)(2) Motion to Dismiss, the challenging party bears the burden of proof on the issue, unless the lack of jurisdiction is apparent on the face of the complaint.²⁰ The court noted that the challenging party might utilize discovery tools such as depositions, affidavits, and interrogatories in meeting this burden of proof.

2. *Child Custody Jurisdiction*.—The concepts of “home state” and “state of significant connection” as expressed in Indiana’s Uniform Child Custody Jurisdiction Law (UCCJL)²¹ were interpreted in *In re Marriage of Hudson*.²² In *Hudson*, the court observed that, because the father had removed the children to Spain, no state qualified as a “home state” for determining the custody of the children. However, the court found that the alternative statutory provision regarding “significant connection”²³ was available for establishing jurisdiction when a child has been recently removed from his or her home state and the remaining spouse also has moved away.²⁴ Under the significant connection test, the state having maximum access to relevant evidence regarding the child’s present and future care has jurisdiction.

The *Hudson* court found that the judicial inquiry in an adjudication of a child’s status in custody proceedings under the UCCJL is an exception to the minimum contacts standard applied to *in rem* proceedings.²⁵ The *Hudson* court noted that in *Shaffer v. Heitner* the Supreme Court “recognized the necessity of such specialized jurisdictional rules in *in rem* status proceedings.”²⁶ Therefore, a court may adjudicate child custody under the UCCJL without acquiring personal jurisdiction over an absent parent, if reasonable attempts to give the parent notice of the proceedings have been made.²⁷

Hudson is particularly significant because the court also construed Indiana Trial Rule 4.4(A)(7) and noted that the particular long arm jurisdictional provision applies only when a party maintains *continuous* residency in Indiana, which did not appear in the *Hudson* facts.²⁸ Thus, when a spouse leaves Indiana and then returns, Trial Rule 4.4(A)(7)

²⁰*Id.* at 1340.

²¹IND. CODE §§ 31-1-11.6-1 to -24 (1982).

²²434 N.E.2d 107 (Ind. Ct. App. 1982).

²³IND. CODE § 31-1-11.6-3(a)(2) (1982).

²⁴434 N.E.2d at 115 (citing Uniform Child Custody Jurisdiction Act § 3 Commissioners’ notes, 9 U.L.A. 123-25 (1979)). The *Hudson* court found the Commissioners’ notes persuasive because the version adopted by Indiana is identical to the corresponding paragraph of the Uniform Act. 434 N.E.2d at 115 n.7.

²⁵434 N.E.2d at 117 (distinguishing *Shaffer v. Heitner*, 433 U.S. 186 (1977)).

²⁶434 N.E.2d at 119 (citing *Shaffer v. Heitner*, 433 U.S. 186, 208 n.30 (1977)).

²⁷434 N.E.2d at 117.

²⁸*Id.* at 113.

is not satisfied, and jurisdiction is not available under that particular provision.²⁹

3. *Service of Process on a Subsidiary Corporation.*—*General Finance Corp. v. Skinner*³⁰ is an important interpretation of Trial Rules 4.1 and 4.15, but the court's decision rests on the particular facts of this case. In *General Finance*, the court held that service of process on the wholly owned resident subsidiary constituted service on the parent corporation, a nonresident.³¹

The plaintiff in *General Finance* filed suit against the Illinois parent corporation in an Indiana state court and effected service of process on the Indiana subsidiary corporation by serving a registered agent of the Indiana subsidiary. Ultimately, process was returned and a default judgment, which included punitive damages, was entered against the parent corporation. On appeal, the default judgment was sustained.³²

General Finance turned on the fact that the subsidiary was totally owned and controlled in all aspects by the parent corporation. Thus, service of process was upheld, whereas normally a wholly owned subsidiary doing business in the forum state is not a process agent of the parent.³³

The significance of *General Finance* is that service of process on the wholly owned subsidiary's agent was expressly authorized by the subsidiary corporation but not by the parent corporation, and service was effected on the registered agent of the Indiana subsidiary. Because service upon a registered agent of the Indiana subsidiary was deemed to be service upon the parent Illinois corporation, the decision in *General Finance* suggests that under factual circumstances similar to *General Finance*, an attorney may seek a hearing designed to "penetrate the corporate veil" for purposes of service of process, irrespective of the fact that the parent corporation has not authorized receipt of process by the registered agent.

This case also suggests that whenever a corporation or other organization, which has sufficient minimum contacts with Indiana, appoints a registered agent or an organization to receive process for it, then process served upon that duly appointed agent will sustain jurisdiction in an Indiana trial court regardless of whether the registered agent or organization is in Indiana. For example, *X* corporation, an Ohio business, has been appointed by *Y* corporation, a

²⁹*Id.*

³⁰426 N.E.2d 77 (Ind. Ct. App. 1981). For a full discussion of the case, see Galanti, *Business Associations*, 1982 Survey of Recent Developments in Indiana Law, 16 IND. L. REV. 25, 37 (1983).

³¹426 N.E.2d at 86.

³²*Id.*

³³*Id.* at 82-85.

foreign corporation with subsidiaries in Indiana, to receive process. Plaintiff serves process on *X* corporation from an Indiana trial court. If service of process is duly effected on *X* corporation pursuant to the Indiana rule, then process has been validly served upon *Y* corporation, although *Y* corporation did not contemplate that *X* corporation would receive process from courts outside of Ohio when *Y* appointed *X* as its registered agent. The court in *General Finance* sustained that method of service of process by allowing process on the parent Illinois corporation to be effected by serving the subsidiary in Indiana, even though the parent corporation had not expressly authorized such service of process.

4. *Timely Service of Process.*—The court in *Geiger & Peters, Inc. v. American Fletcher National Bank*³⁴ decided important questions concerning timely service of process and Trial Rule 41(A). In *Geiger & Peters* a third party complaint was filed against Geiger & Peters, Inc. and American Fletcher National Bank (AFNB). Geiger & Peters, Inc. subsequently cross-claimed against AFNB but did not serve process. Thereafter, under Trial Rule 41(A), which allows an action to be dismissed without a court order, the parties stipulated to dismiss the initial plaintiff's suit. AFNB argued that the stipulation of dismissal also dismissed the cross-claim against it, and, regardless of the effect of the dismissal, AFNB argued that Geiger & Peters failed to serve the cross-claim on AFNB within the one-year statute of limitation for filing a mechanic's lien.³⁵ Thus, the issues were whether the word "action" in Trial Rule 41(A)³⁶ meant the entire controversy was dismissed and not merely a single claim or party, and whether process that was served two years after filing the cross-claim was effective.

Noting the disagreement between other jurisdictions concerning the term "action" in similar trial rules, the court of appeals adopted the better view and determined that the word "action" meant a particular claim for relief.³⁷ Thus, the parties' stipulation of dismissal dismissed only the plaintiff's complaint and not the cross-claim.³⁸

The appellate court then determined that filing the cross-claim against AFNB had tolled the statute of limitations because filing commences an action, and commencement of a cause of action tolls the

³⁴428 N.E.2d 1279 (Ind. Ct. App. 1981).

³⁵IND. CODE § 32-8-7-1 (1982).

³⁶IND. R. TR. P. 41(A).

³⁷428 N.E.2d at 1281. See also *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 194-95 (5th Cir. 1980) (rejecting argument that term "action" as used in Trial Rule 41(a) means the entire controversy). *Contra Philip Carry Mfg. Co. v. Taylor*, 286 F.2d 782 (6th Cir.), cert. denied, 366 U.S. 948 (1961); *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir.), cert. denied, 345 U.S. 964 (1953) (holding that the term "action" as used in Trial Rule 41(a) means the entire controversy).

³⁸428 N.E.2d at 1281.

statute of limitations.³⁹ Furthermore, finding the language unambiguous in Trial Rule 3, which specifies that filing a complaint commences an action, the court refused to hold that tolling the statute of limitations was "conditioned upon diligence in service."⁴⁰ However, the court noted that Trial Rule 41(E) allows dismissal for failure to diligently prosecute a claim and thus provides "adequate protection against unreasonable delay in serving process."⁴¹ The court added that subsequent but untimely service would not be sufficient to resume prosecution and, therefore, would not preclude a 41(E) motion.⁴²

5. *Change of Venue.*—In *State v. Marion County Superior Court*,⁴³ the trial court judge had set aside his order granting a change of venue and had resumed jurisdiction of the case. Before the Indiana Supreme Court, the respondent judge posited that because a local Marion County Superior Court rule provided ten days for perfecting a change of venue after a party had selected a county, and because the ten days had expired before the parties in this case filed a proposed order to perfect the change, the original court could resume jurisdiction and a previously granted change of venue could be denied.

The Indiana Supreme Court, considering this issue pursuant to Indiana Code section 34-1-13-2,⁴⁴ held that the only consideration in determining whether the court granting a change of venue may resume jurisdiction is whether the applicant paid the court costs within the stated time frame.⁴⁵ The supreme court further noted that this holding is consistent with Trial Rule 78 because the Trial Rule merely provides "a procedure for properly vesting jurisdiction in the court to which venue has been changed before that court's receipt of the transcript."⁴⁶ The court's decision indicates that local rules which conflict with Indiana statutes and Trial Rules may be held invalid.

C. Pleadings and Pre-Trial Motions

1. *Trial Rule 8(C): Waiver of Affirmative Defense.*—In *State v. Totty*,⁴⁷ an action against the State by various plaintiffs for personal injuries sustained in an auto collision, the court of appeals held that the State had not waived its right to raise an affirmative defense even

³⁹*Id.* at 1282.

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.* at 1283 (distinguishing *State v. McClaine*, 261 Ind. 60, 300 N.E.2d 342 (1973)) (holding that defendant must file 41(E) motion before plaintiff resumes diligent prosecution).

⁴³430 N.E.2d 1170 (Ind. 1982).

⁴⁴IND. CODE § 34-1-13-2 (1982).

⁴⁵430 N.E.2d at 1171.

⁴⁶*Id.* at 1172. See IND. R. TR. P. 78.

⁴⁷423 N.E.2d 637 (Ind. Ct. App. 1981).

though the State failed to plead the issue in its answer. The affirmative defense involved a release that had been signed by two intervening plaintiffs in a prior proceeding to settle against a different defendant. At trial, the State contended that the release of all parties liable for the collision acted as a release of the State because of the general rule regarding release of joint tort-feasors.⁴⁸

The court of appeals held that the effect of the release was a properly triable issue and distinguished *Totty* from a prior appellate decision which had held that the failure to raise the release of the joint tort-feasor in the answer or in other pleadings, or to litigate the release at trial effected a waiver of the issue.⁴⁹ The court noted that in *Totty* the State had included the issue of the release in its pre-trial contentions, which superseded the answer.⁵⁰ Further, the issue of the release was litigated by the parties and was made the subject of the State's motion for judgment on the evidence.⁵¹ Thus, the decision in *Totty* indicates that an affirmative defense is not required to be raised in the answer but may be raised for the first time at any stage of the pre-trial proceedings, or perhaps even at trial.

2. *Motion in Limine*.—In an eminent domain action, the condemnees in *Indiana & Michigan Electric Co. v. Pounds*⁵² filed a motion in limine to prevent discovery, after the opposing party had moved to compel discovery. The trial court overruled the motion to compel and granted the motion in limine. The utility company appealed from an adverse judgment, alleging, *inter alia*, that the trial court abused its discretion in granting the motion in limine.

On appeal, the court noted the unusual and misplaced use of the motion in limine in this suit, and the court held that a motion in limine may not be used to frustrate discovery because the motion's sole function is "to protect the moving party from the possible prejudicial effect of *in-court statements before the jury*."⁵³ Because there was no discernible basis for denying discovery, the appellate court ruled that the grant of the motion in limine was reversible error.⁵⁴

3. *Trial Rule 16: Pre-Trial Orders*.—*Hundt v. LaCrosse Grain Co.*,⁵⁵ presented an important discussion regarding the issues that are formulated during pre-trial procedures. In *Hundt*, the trial judge set

⁴⁸*Id.* at 640-41. The general rule is that a release of one joint tort-feasor is a release of all. *Cooper v. Robert Hall Clothes, Inc.*, 390 N.E.2d 155 (Ind. 1979).

⁴⁹423 N.E.2d at 642 (citing *Weenig v. Wood*, 169 Ind. App. 413, 349 N.E.2d 235 (1976)).

⁵⁰423 N.E.2d at 642.

⁵¹*Id.*

⁵²426 N.E.2d 45 (Ind. Ct. App. 1981).

⁵³*Id.* at 47 (*emphasis added*).

⁵⁴*Id.*

⁵⁵425 N.E.2d 687 (Ind. Ct. App. 1981).

aside a jury verdict for the plaintiff because the judge determined that he had erred by allowing the testimony at trial to exceed the issues defined by the pre-trial order.

Citing Indiana Supreme Court precedent, the court of appeals in *Hundt* noted that “[t]he expressed purpose of Trial Rule 16 . . . is to provide for a pre-trial conference in which to simplify the issues raised by the pleadings and to define these issues within a pre-trial order.”⁵⁶ However, the appellate court in *Hundt* concluded that pre-trial orders should be liberally construed to include all legal and factual theories inherent in the issues.⁵⁷ Therefore, because the pre-trial order did not restrict *Hundt* to a particular legal theory to prove his allegations and because the evidence presented was not inapplicable to the facts, the court of appeals held that the admission of the testimony was not error.⁵⁸

4. *Trial Rule 56: Motion for Summary Judgment.*—In *Associates Financial Services v. Knapp*,⁵⁹ the Indiana Court of Appeals concluded, as a matter of first impression, that a counterclaim which seeks damages in excess of the original claim does not act as an automatic bar to summary judgment on the original claim.⁶⁰ Reviewing decisions from other jurisdictions, the court in *Knapp* noted two situations where summary judgment has been held appropriate, despite an excess counterclaim. A court may grant summary judgment to the plaintiff if the defendant offers no real defense and relies solely on the counterclaim,⁶¹ or if a counterclaim, although related to the plaintiff's claim, is really a separate and distinct claim involving damages of a completely different nature which might arise from different circumstances than the plaintiff's complaint.⁶² The *Knapp* court indicated that a court may stay judgment on the original claim,⁶³ but the court declined to do so in this case because the defendant did not raise this as an issue. In addition, the court in *Knapp* found that the defendant had failed to challenge the court's severance of the counterclaim, thus waiving the issue of the claim's separate nature, and found that the defendant had failed to show a genuine issue of material fact.

⁵⁶*Id.* at 694 (quoting *North Miami Consolidated School District v. State ex rel. Manchester Community Schools*, 261 Ind. 17, 20, 300 N.E.2d 59, 62 (1973)).

⁵⁷425 N.E.2d at 695.

⁵⁸*Id.* at 696.

⁵⁹422 N.E.2d 1261 (Ind. Ct. App. 1981).

⁶⁰*Id.* at 1265.

⁶¹*Id.* (citing *Graham Associates, Inc. v. Fell*, 192 A.2d 129 (D.C. App. 1963)).

⁶²422 N.E.2d at 1265 (citing *Sunbeam Corp. v. Morris Distributing Co.*, 55 A.D.2d 722, 389 N.Y.S.2d 173 (N.Y. App. Div. 1976)).

⁶³422 N.E.2d at 1265 (citing *Graham Associates, Inc. v. Fell*, 192 A.2d 129 (D.C. App. 1963); *Sunbeam Corp. v. Morris Distributing Co.*, 55 A.D.2d 722, 389 N.Y.S.2d 173 (N.Y. App. Div. 1976)).

Therefore, the court held that summary judgment on the plaintiff's original claim was proper.⁶⁴

In *Otte v. Tessman*,⁶⁵ the Indiana Supreme Court consolidated two cases to consider the question regarding the necessity for trial courts to comply strictly with Trial Rule 56, which requires the trial court to set a time for hearing the motion for summary judgment. In each case, the trial court had granted a motion for summary judgment without setting a hearing date for considering the motion, and the court of appeals had affirmed the trial court's ruling, because the appellant had failed to prove that he was prejudiced by the trial court's failure to follow the procedure set out in Trial Rule 56.⁶⁶ On petition to transfer, the Indiana Supreme Court overturned both rulings based on the trial courts' failure to entertain the summary judgment motions consistent with Trial Rule 56(C).⁶⁷

The supreme court found that prejudice to the parties is presumed if a trial court fails to follow the mandated procedure in Trial Rule 56, because the language in Trial Rule 56 is explicit, and, therefore, the parties are justified in relying on those procedures.⁶⁸ The supreme court quoted Judge Staton's dissent in the court of appeals' decision:

"If the failure to obey the clear explicit dictates of the Indiana Rules of Procedure can be simply dismissed as harmless error, then, the erosion of an orderly judicial system has begun. If the [Rules of Procedure] can be re-written by judicial opinion . . . the shroud of confusion will prevent any meaningful, just and predictable solution to those disputes which must be resolved in our courts."⁶⁹

The supreme court's decision in *Otte* indicates that the practice of the trial courts cannot be inconsistent with the published trial rules

⁶⁴422 N.E.2d at 1265.

⁶⁵426 N.E.2d 660 (Ind. 1981). This suit is a consolidation of two cases both of which were petitioned for transfer to the supreme court. *Indiana State Highway Dep't v. Collins*, 413 N.E.2d 982 (Ind. Ct. App. 1980) (originating in the Marion County Superior Court, Judge Betty Barreau); *Otte v. Tessman*, 412 N.E.2d 1223 (Ind. Ct. App. 1980) (originating in the Lake Superior Court, Judge Cordell C. Pinkerton).

⁶⁶426 N.E.2d at 661. In *Indiana State Highway Dep't v. Collins*, the trial court had granted the plaintiff's motion for summary judgment six days after the motion was filed. 413 N.E.2d 982 (Ind. Ct. App. 1980). In *Otte v. Tessman*, the trial court had granted the defendant's motion for summary judgment five months after the filing but without setting a hearing date or a deadline for filing all evidentiary materials in support of or in opposition to the motion. 412 N.E.2d 1223 (Ind. Ct. App. 1980).

⁶⁷426 N.E.2d at 661-62. Trial Rule 56(C) provides, in part, as follows: "The motion shall be served at least ten [10] days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits." IND. R. TR. P. 56(C).

⁶⁸426 N.E.2d at 661-62.

⁶⁹*Id.* at 662 (quoting *Otte v. Tessman*, 412 N.E.2d 1223, 1232 (Ind. Ct. App. 1980) (Staton, J., dissenting)).

adopted by the Indiana Supreme Court, and that trial courts must strictly comply with those rules.

D. Parties and Discovery

1. *Trial Rule 17(A)(2): Real Party in Interest in Class Action Suit.*—In *Adams v. City of Fort Wayne*,⁷⁰ property owners appealed the trial court's dismissal of their challenge to the rezoning and the annexation of land by the city of Fort Wayne. The trial court had based its decision on the fact that the property owners lacked standing to challenge the annexation in an *individual capacity*.

Agreeing that the plaintiffs lacked standing as individuals, the court of appeals noted that the plaintiffs may have had standing as a class and held that the failure to designate a suit as a class action is not fatal to the complaint.⁷¹ The appellate court stated that:

“Cases often will be found where an individual seeks relief in his or another's name upon a cause of action available only to a class. Failure to designate the action as a class action should not be fatal under Rule 17(A) allowing a reasonable time for naming the proper party.”⁷²

Thus, although the trial court's dismissal was affirmed on other grounds, the court of appeals found that Trial Rule 17(A) requires parties be given a reasonable opportunity to amend their complaint and bring suit on behalf of all interested parties.⁷³

2. *Trial Rules 20 and 24: Joinder of Parties and Intervention.*—In *Krieg v. Glassburn*,⁷⁴ the maternal grandparents sought to join in a custody proceeding to obtain visitation rights. The Kriegs had titled their petition as one for joinder under Trial Rule 20. In ruling that joinder was inapplicable, the *Krieg* court said that Trial Rule 20 pertains only to those persons who may be parties to the action from the outset and to those who may be brought into the suit by the original parties.⁷⁵ However, the court looked beyond the title of the petition to the substance of the motion. The court of appeals found that the petition was actually a motion to intervene under Trial Rule

⁷⁰423 N.E.2d 647 (Ind. Ct. App. 1981).

⁷¹*Id.* at 649.

⁷²*Id.* (quoting W. HARVEY, 2 INDIANA PRACTICE 334 (1970)).

⁷³423 N.E.2d at 649.

⁷⁴419 N.E.2d 1015 (Ind. Ct. App. 1981). The Kriegs had also sought to intervene in the adoption proceeding. The court denied intervention in that proceeding because the adoption statute sets out who may be a party to an adoption and does not include grandparents. *Id.* at 1019-21. See IND. CODE § 31-3-1-3 to -6 (1982). For a full discussion of the case, see Rhine & Weinheimer, *Domestic Relations, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 203, 212 (1982).

⁷⁵419 N.E.2d at 1017.

24 and, because of the Kriegs' interest in their grandchildren, that Trial Rule 24 was broad enough to encompass the grandparents' action.⁷⁶ Although denial of a motion to intervene may only be challenged on appeal from a final judgment,⁷⁷ the appellate court found that the trial court's denial of the Kriegs' motion had the effect of determining the whole issue; therefore, the denial was a final judgment and subject to appeal.⁷⁸

3. *Discovery Rules.*—a. *Administrative agencies.*—In *Josam Manufacturing Co. v. Ross*,⁷⁹ the court of appeals held that, pursuant to Trial Rule 28(F),⁸⁰ Trial Rules 26 through 37 apply to the Indiana Industrial Board. In *Josam*, the Indiana Industrial Board had ordered the Josam Manufacturing Co. (Josam) to answer interrogatories submitted by Ross as part of his workers' compensation claim. Josam had refused, and the trial court had ordered compliance, awarding attorney fees as a sanction.

On appeal, Josam argued that the Indiana Trial Rules did not apply to the Industrial Board. Relying on *State v. Frye*,⁸¹ the *Josam* court said that Trial Rules 26 through 37 were an exception to the general rule that "the Indiana Trial Rules do not govern or bind the Industrial Board of Indiana."⁸² The court rejected Josam's argument that *Frye* was inapplicable because *Frye* concerned an agency which was bound by the Administrative Adjudication Act (AAA). Instead, the court in *Josam* examined the similarity between the Industrial Board's powers and the powers of the agency in *Frye*, and reviewed the language of Trial Rule 28(F). Because Trial Rule 28(F) says "any" adjudicatory hearing before an administrative agency and an Industrial Board hearing is "trial-like," the court found that the discovery rules applied to the Industrial Board, even though the Industrial Board was not subject to the AAA.⁸³ Therefore, the court held that the Industrial Board had the authority to order Josam to answer the interrogatories.⁸⁴ The appellate court also concluded that the sanctions in Trial

⁷⁶*Id.* at 1017-18.

⁷⁷*Id.* Trial Rule 24 provides: "The court's determination upon a motion to intervene may be challenged only by appeal from the final judgment . . ." IND. R. TR. P. 24(C). Appeal may be effected by either Indiana Trial Rule 54 or Appellate Rule 4(B)(6). See IND. R. TR. P. 54; IND. R. APP. P. 4(B)(6).

⁷⁸419 N.E.2d at 1017.

⁷⁹428 N.E.2d 74 (Ind. Ct. App. 1981).

⁸⁰IND. R. TR. P. 28(F).

⁸¹161 Ind. App. 247, 315 N.E.2d 399 (1974). In *Frye*, the court found that Trial Rule 28(F) provided an exception to the general rule that trial rules are inapplicable to administrative agencies. *Id.* at 251, 315 N.E.2d at 402. *Frye* involved an agency which was subject to the Administrative Adjudication Act. IND. CODE § 4-22-1-1 to -22 (1982).

⁸²428 N.E.2d at 75.

⁸³*Id.* at 76-77. See IND. R. TR. P. 28(F).

⁸⁴428 N.E.2d at 77.

Rule 37(B) would apply; however, because Josam had disobeyed the Industrial Board's order, not the trial court order, the trial court could not order sanctions.⁸⁵

b. *Depositions.*—In *Hales & Hunter Co. v. Norfolk & Western Railway*,⁸⁶ the parties had taken depositions and, prior to trial, had stipulated that the depositions may be published, may be included in the trial record, and may be considered by the court. However, the trial record did not indicate that the trial court had published the depositions or had considered the depositions in arriving at its verdict. Therefore, on appeal, the court of appeals issued a writ of certiorari to the trial court clerk, directing that the depositions be forwarded for appellate consideration.⁸⁷ The appellate court affirmed the trial court's decision, basing the affirmance on the evidence contained in the depositions.⁸⁸

On review by the Indiana Supreme Court, the judgments of the lower court and the appellate court were vacated, and the case was remanded for further consideration by the trial court.⁸⁹ The supreme court held it was mandatory that the trial court publish and consider the depositions, regardless of the parties' stipulation that the depositions "may" be considered, because a trial court must consider all properly tendered evidence which is relevant and not repetitive.⁹⁰ In regard to the role of the appellate court, the supreme court noted that an appellate court's review is limited to those matters contained in the trial record. If depositions are not published by the trial court, then, in its review, the appellate court would "resort to speculation and conjecture" that the trial court's judgment was based on the evidence in the depositions.⁹¹ Thus, if a deposition is to be used at trial, it must be published as a matter of the trial court's record, and only then is the deposition available to be reviewed on appeal.

c. *Trial Rule 37: Sanctions.*—On rehearing, the court of appeals in *State v. Kuespert*⁹² upheld a discovery sanction that shifted the burden of proof to the State on a significant issue by requiring the State to submit evidence on the issue. The sanction was imposed pursuant to Trial Rule 37(B)(3), which explicitly allows such an order.⁹³

The appellate court in *Kuespert* also reviewed this sanction and the trial court's order that the State pay attorney fees, to determine

⁸⁵*Id.* at 77-78.

⁸⁶428 N.E.2d 1225 (Ind. 1981).

⁸⁷*Id.* at 1226.

⁸⁸*Id.*

⁸⁹*Id.* at 1227.

⁹⁰*Id.*

⁹¹*Id.*

⁹²425 N.E.2d 229 (Ind. Ct. App. 1981).

⁹³See IND. R. TR. P. 37(B)(3).

which discovery sanctions are appealable as a matter of right.⁹⁴ The court first noted that the sanction to shift the burden of proof was severable from the order to pay attorney fees for the purpose of interlocutory appeals. The court then stated that discovery orders are generally interlocutory and that interlocutory orders are allowed to be appealed only by express statutory authority.⁹⁵ However, the court added that discovery sanctions requiring the payment of money are interlocutory orders for money payments and, thus, are appealable as a matter of right under Appellate Rule 4(B)(1).⁹⁶ Other sanctions that accompany a money payment sanction, like the sanction to shift the burden of proof, are appealable only if certified by the trial court and accepted by the appellate court, pursuant to Appellate Rule 4(B)(6).⁹⁷

In *Breedlove v. Breedlove*,⁹⁸ the former wife had sued to recover child support arrearages, and the trial court had entered a default judgment against the husband because he had failed to answer interrogatories after the court had ordered him twice to answer, pursuant to Trial Rule 37. The husband appealed the default judgment.

On appeal, the default judgment for arrearages and attorney fees was affirmed.⁹⁹ The appellate court noted that the discovery sanction of dismissal or default judgment is severe; however, such a sanction is within the trial court's discretion when a "party has in bad faith abusively resisted or obstructed discovery or violated a court order enforcing discovery," and the court finds that such actions prejudice the discovering party's rights.¹⁰⁰ The holding in this case, based on the defendant's repeated failure to obey court orders for discovery, continues to be good law, even though the 1982 amendments to Trial Rule 37 have eliminated the "bad faith" requirement and limited the sanction of default to defendants who fail to obey court orders for discovery.¹⁰¹ Additionally, the court noted that Trial Rule 37(B)(4) does not require a court to make specific findings of fact when granting a party's motion for sanctions.¹⁰²

⁹⁴425 N.E.2d at 232. For a discussion of the earlier appellate case, see Harvey, *Civil Procedure and Jurisdiction*, 1981 *Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 69, 93-94 (1982).

⁹⁵425 N.E.2d at 231. For cases where interlocutory appeals were held to be authorized by statute, see *Anthrop v. Tippecanoe School Corp.*, 257 Ind. 578, 277 N.E.2d 169 (1972); *Estate of Newman v. Hadfield*, 174 Ind. App. 537, 369 N.E.2d 427 (1977); *Caster v. Caster*, 165 Ind. App. 520, 333 N.E.2d 124 (1975).

⁹⁶425 N.E.2d at 231. See IND. R. APP. P. 4(B)(1).

⁹⁷425 N.E.2d at 232. See IND. R. APP. P. 4(B)(6).

⁹⁸421 N.E.2d 739 (Ind. Ct. App. 1981).

⁹⁹*Id.* at 740.

¹⁰⁰*Id.* at 742.

¹⁰¹See IND. R. TR. P. 37(B)(2)(c). Amended Trial Rule 37(B)(2)(c) eliminates the requirement, alluded to in *Breedlove*, that the sanction of default may be ordered only when other sanctions would be inadequate.

¹⁰²421 N.E.2d at 743.

E. Trials and Judgments

1. *Trial Court's Function as the Thirteenth Juror.*—In *Bossard v. McCue*,¹⁰³ a medical malpractice suit, the court of appeals held that the trial judge was not required to disqualify himself from ruling on post-trial motions, even though the judge had commented negatively on the evidence after the jury had retired to deliberate. The trial judge had found that the jury verdict for the physician was against the weight of the evidence and had ordered a new trial.

The court of appeals, in upholding the trial court order, determined that the trial judge's comments, which were made in his chambers, were a reaction to the evidence and were in accordance with the judge's role as the "thirteenth juror."¹⁰⁴ The court emphasized the importance of *when* the biased comments were made. Because the trial judge had not commented *before* the presentation of evidence,¹⁰⁵ but only commented after the presentation of all the evidence and after the jury had retired for deliberations, no disqualification was necessary.¹⁰⁶ However, the court of appeals did caution judges to refrain from making comments while the jury is deliberating.¹⁰⁷

In *State v. Lewis*,¹⁰⁸ a criminal proceeding, the Indiana Supreme Court addressed the appropriate usage and standards of Trial Rules 50 and 59.¹⁰⁹ In *Lewis*, the State argued that the trial court erred in granting a motion for judgment on the evidence when the jury had failed to reach a verdict and had been discharged, and that the trial court had used an incorrect standard in applying the "thirteenth juror" rule to the defendant's post-trial motion for judgment on the evidence under Trial Rule 50.

In *Lewis*, the supreme court found that a trial court has authority under Trial Rule 50 to enter final judgment on the evidence either before or after a jury is discharged. Therefore, the court in *Lewis* held that the trial court in this case could grant judgment on the

¹⁰³425 N.E.2d 682 (Ind. Ct. App. 1981).

¹⁰⁴*Id.* at 684. See Justice Hunter's discussion of the role of the trial judge as juror in *Bailey v. Kain*, 135 Ind. App. 657, 663-64, 492 N.E.2d 486, 488-89 (1963).

¹⁰⁵See *Brokus v. Brokus*, 420 N.E.2d 1242 (Ind. Ct. App. 1981) (holding that reversal is required where the judge's remarks, made during opening arguments, indicated bias against the appellant).

¹⁰⁶425 N.E.2d at 684.

¹⁰⁷*Id.*

¹⁰⁸429 N.E.2d 1110 (Ind. 1981).

¹⁰⁹See IND. R. TR. P. 50, 59. The court began its discussion by noting the applicability of the civil rules to criminal cases: "[r]ules of civil procedure, whether statutory or court-made, are applicable to criminal cases where no criminal procedural rule or statute exists." 429 N.E.2d at 1113 (citing IND. CODE § 35-4.1-2-2 (1976)). For current law, see IND. CODE § 35-35-2-2 (1982); IND. R. CRIM. P. 21.

evidence for the defendant, even though no verdict was returned and the motion was granted after the declaration of a mistrial and the jury's discharge.¹¹⁰

The supreme court also determined that the "thirteenth juror" standard, which allows the judge to weigh the evidence, is properly applied when evaluating a Trial Rule 59 motion for a new trial, but that the "thirteenth juror" standard cannot be applied to a Trial Rule 50 motion for judgment on the evidence.¹¹¹ The court stated that, in both civil and criminal cases, a judgment on the evidence is proper only where there is a total absence of evidence on some essential issue, or where the evidence is without conflict and susceptible of only one inference in favor of the moving party.¹¹²

Essentially, the *Lewis* decision denies the trial court's ability, pursuant to Trial Rule 50, to enter a judgment on the evidence where there is *any* conflicting evidence, because if a conflict exists, there would not be "complete failure of proof."¹¹³ Thus, the *Lewis* holding advocates a "scintilla rule" when a Trial Rule 50 motion is considered.

2. *Trial Rule 63: Unavailability of Judge.*—The Indiana Supreme Court in *State ex rel. Indiana-Kentucky Electric Corp. v. Knox Circuit Court*,¹¹⁴ determined that Trial Rule 63 is an exception to the "law of the case" doctrine and allows a successor judge to grant a new trial after the original judge has ruled on the case.¹¹⁵ In *Knox Circuit Court*, the judge presiding over the trial had died after determining the liability issue but before entering judgment on the damages issue. In accordance with Trial Rule 63(A) a successor judge was appointed, whereupon the defendant moved for a new trial on both the liability and damages issues. Over the plaintiff's objection, the successor judge ordered a new trial on both issues.

On appeal, the supreme court upheld the order for a new trial on both the liability issue and the damages issue, noting the trial court's power pursuant to Trial Rule 63.¹¹⁶ In general, the rule permits a successor judge to grant a new trial after a verdict is returned

¹¹⁰429 N.E.2d at 1114.

¹¹¹*Id.*

¹¹²*Id.* (citing, among others, *Proctor v. State*, 397 N.E.2d 980 (Ind. 1979); *Williams v. State*, 395 N.E.2d 239 (Ind. 1979)). The major case in Indiana which sets forth the standard to be applied in granting a motion for judgment on the evidence is *Huff v. Travelers Indem. Co.*, 266 Ind. 414, 363 N.E.2d 985 (1977).

¹¹³*But see* 429 N.E.2d at 117-18 (DeBruler, J., dissenting).

¹¹⁴422 N.E.2d 1247 (Ind. 1981) (bifurcated trial).

¹¹⁵*Id.* at 1248. The doctrine of the law of the case was described by Justice Holmes as a policy expressing "the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912).

¹¹⁶422 N.E.2d at 1248.

or findings are entered by the trial court, if the successor judge is satisfied that he cannot perform the duties of the trial judge because he did not preside at the trial, or for *any reason*.¹¹⁷ Thus the *Knox Circuit Court* decision imputes broad discretion to the successor judge in utilizing Trial Rule 63 by allowing the successor judge to order a new trial on issues previously decided.

3. *Finality of Judgment, Res Judicata.*—The doctrine of res judicata was thoroughly discussed in *White v. Davis*,¹¹⁸ a dissolution action involving multiple claims. The court of appeals stated that “[t]he doctrine of res judicata acts as a bar when the same parties to an earlier final judgment on the merits attempt to relitigate the same issues,”¹¹⁹ and that “[f]or res judicata purposes the earlier judgment is final when it disposes of the subject matter of the litigation to the furthest extent of the court’s powers and reserves no further question for future determination.”¹²⁰ However in a multiple claims case, a judgment, decision, or order on fewer than all of the claims does not result in a final judgment and, under Indiana procedural law, cannot be appealed unless the trial court, pursuant to Trial Rule 54(B), determines that there is no reason for delay and expressly directs the entry of a judgment.¹²¹ Claims are, by definition, separate where each claim depends on a different legal theory and on different factual evidence.¹²² The court in *White* recognized the general rule that every question within the issues litigated which could have been proven is presumed to be adjudicated; however, that presumption is premised upon the existence of a final judgment.¹²³ Therefore, the court found that where a judgment leaves issues open for modification and the issues are not ripe for appeal, the presumption of finality will not apply.¹²⁴

Thus, according to the decision in *White*, when a trial court is presented with multiple claims and decides one of them, but does not certify that claim for appeal under Trial Rule 54(B) and does not settle other issues presented, an order on fewer than all of the claims is not a final order or judgment, and there is nothing upon which to base a res judicata defense.¹²⁵ The decision in *White* is important for

¹¹⁷See IND. R. TR. P. 63.

¹¹⁸428 N.E.2d 803 (Ind. Ct. App. 1981).

¹¹⁹Id. at 804-05 (citing *In re Terry*, 394 N.E.2d 94 (Ind. 1979), cert. denied, 444 U.S. 1077 (1980); *Gasaway v. State*, 249 Ind. 241, 231 N.E.2d 513 (1967)).

¹²⁰428 N.E.2d at 805 (citing *Richards v. Franklin Bank & Trust Co.*, 381 N.E.2d 115 (Ind. Ct. App. 1978)).

¹²¹428 N.E.2d at 805. See IND. R. TR. P. 54(B).

¹²²428 N.E.2d at 805.

¹²³Id.

¹²⁴Id. at 806.

¹²⁵Id.

understanding the developing case law of collateral estoppel and in understanding the offensive and defensive use of issue preclusion in subsequent litigation between the same parties or between different parties to the prior litigation.

F. Appeals

1. *The Relationship between Trial Rules 59 and 60.*—The Indiana Court of Appeals explored the interrelationship between Trial Rules 59 and 60 in *Dawson v. St. Vincent's Health & Hospital Care Center*.¹²⁶ In *Dawson*, the trial court had entered a default judgment against the defendants and then had denied the defendants' motion for relief under Trial Rule 60. The defendants appealed the denial of their Trial Rule 60 motion, but they did not file a motion to correct errors pursuant to Trial Rule 59.

On appeal, the fourth district court of appeals considered whether the Trial Rule 60(B) motion seeking relief, which was filed within the sixty-day time limit stipulated in Trial Rule 59, was equivalent to a Trial Rule 59 motion to correct errors.¹²⁷ Although the court in *Dawson* recognized that the underlying purpose of Trial Rule 59 and Trial Rule 60 motions is to call the trial court's attention to appealable errors, the court determined that in this case a Trial Rule 59 motion was required prior to appeal.¹²⁸

In reaching this determination, the appellate court distinguished *In re Marriage of Robbins*,¹²⁹ where the third district court of appeals had held that, because of the overlapping purposes of Trial Rules 59 and 60, if a Trial Rule 60(B) purpose is stated in a motion, then, regardless of the motion's denomination, it is treated as a Trial Rule 59 motion if filed within the sixty-day period after judgment. The *Dawson* court explained that a Trial Rule 60(B) motion may serve only as a Trial Rule 59 motion if it meets the purposes of the Trial Rule 59 motion,¹³⁰ but the court noted that often the Trial Rule 60(B) motion calls on the equity powers of the trial court for relief because no appealable error exists.¹³¹ Thus, unlike the *Robbins* case where the

¹²⁶426 N.E.2d 1328 (Ind. Ct. App. 1981).

¹²⁷*Id.* at 1332.

¹²⁸*Id.* at 1333.

¹²⁹171 Ind. App. 509, 358 N.E.2d 153 (1976).

¹³⁰In *Dawson*, the court listed the purposes of a Trial Rule 59 motion as follows: "1) to present to the trial court an opportunity to correct errors which occur prior to filing of the motion, 2) to develop those points which will be raised on appeal by counsel and 3) to inform the opposing party concerning the points which will be raised on appeal so as to provide that party an opportunity to respond in the trial court and on appeal."

426 N.E.2d at 1333 (quoting *P-M Gas & Wash Co. v. Smith*, 268 Ind. 297, 301, 375 N.E.2d 592, 594 (1978)).

¹³¹426 N.E.2d at 1332-33.

questioned Trial Rule 60(B) motion was clearly adequate to serve as a motion to correct errors, the Trial Rule 60(B) motion in *Dawson* raised no error and developed no appealable issues.¹³² Consequently, because no motion to correct errors was filed, in either form or substance, the appellate court in *Dawson* held that no error was presented on appeal, and, therefore, that the court was without authority to "fish for errors."¹³³

In contrast, the court of appeals for the third district reaffirmed *Robbins* in *Sowers v. Sowers*,¹³⁴ without making the distinctions enunciated in *Dawson*. *Sowers* involved a default judgment against the husband in a dissolution action. He filed a timely Trial Rule 60(B) motion but failed to effect service of process on the wife, who was not advised of the motion. Thereafter, the wife filed a motion to reconsider, followed by the praecipe and then the appeal. The court of appeals concluded that, because the husband had filed a Trial Rule 60(B) motion for relief from judgment within sixty days of the original judgment, it should be treated as a Trial Rule 59 motion for purposes of perfecting the appeal, without determining whether the Trial Rule 60(B) motion met the purposes of a motion to correct errors.¹³⁵

The court in *Sowers* added that because the wife was a party who was prejudiced or adversely affected by the ruling on the Trial Rule 60(B) motion, she would come within the ambit of Trial Rule 59(F), and no jurisdictional challenge could arise because of her failure to file an additional motion to correct errors.¹³⁶ Further, the wife's failure to receive notice and to be given an opportunity to present her case constituted reversible error because a hearing is required on a Trial Rule 60(B) motion.¹³⁷

2. *Timely Filing of Trial Rule 59 Motion.*—In *Sekerez v. Gehring*,¹³⁸ the plaintiff failed to serve the motion to correct errors on the opposing counsel within the sixty-day time limit specified in Trial Rules 5(A) and 59(C).¹³⁹ Ruling on the plaintiff's motion, the trial court found that it was untimely served upon opposing counsel, as well as insufficient on its merits. However, the appellate court distinguished the total failure to serve from an untimely failure to serve. The court of appeals noted that the motion was timely mailed and was received one day late by the court. Because the nonmoving party was not pre-

¹³²*Id.*

¹³³*Id.*

¹³⁴428 N.E.2d 245 (Ind. Ct. App. 1981).

¹³⁵*Id.* at 247.

¹³⁶*Id.*

¹³⁷*Id.* at 248. See IND. R. TR. P. 60(B).

¹³⁸419 N.E.2d 1004 (Ind. Ct. App. 1981).

¹³⁹See IND. R. TR. P. 5(A), 59(C).

judiced by the untimely filing, the court of appeals reversed the lower court's decision and ruled to decide the case on its merits.¹⁴⁰

3. *Second Motion to Correct Errors.*—In *Breeze v. Breeze*,¹⁴¹ a consolidation of two cases, the fundamental questions were whether a second motion to correct errors is permitted, and if so, whether an appeal effected from the ruling on the second motion was timely. In each case, the trial court's entry on a motion to correct errors had been challenged by the parties as error. Accordingly, the parties had filed a second motion to correct errors which the trial court ruled on, initiating the appeals procedure. On appeal, the Indiana Supreme Court held that the filing of a second motion to correct errors was consistent with Trial Rule 59.¹⁴² In addition, the court in *Breeze* clearly held that if a second motion to correct errors is filed, the time for filing an appeal begins running from the decision on the second motion to correct errors.¹⁴³

In discussing a second motion to correct errors, the court noted that "after one motion to correct error has been filed and the trial court has subsequently altered, amended, or supplemented its findings and/or judgment, the parties have the discretion to appeal immediately or to file a new motion to correct error directed to the changed findings and/or judgment."¹⁴⁴ The court observed that this interpretation of Trial Rule 59 provides the needed flexibility in the trial rule and gives all parties equitable opportunity for an appeal. After *Breeze*, however, it is still the law that a second motion to correct errors is not necessary to effect an appeal.¹⁴⁵

The result of the supreme court's decision in *Breeze* provides an attorney with the opportunity to delay the appeals process by the unnecessary filing of a second motion to correct errors. If this occurs, both the trial and appellate courts may utilize Indiana Trial Rule 11(A) to impose penalties on the attorney.¹⁴⁶ Consequently, it certainly is not in the attorney's best interest to file a conspicuously unnecessary second motion to correct errors.

4. *Trial Court's Jurisdiction to Entertain Trial Rule 60 Motion after Filing of Appeal.*—In *Crumpacker v. Crumpacker*,¹⁴⁷ the issue raised on appeal was whether the federal district courts have jurisdiction to entertain a Federal Rule 60(b) motion after an appeal has been

¹⁴⁰419 N.E.2d at 1008.

¹⁴¹421 N.E.2d 647 (Ind. 1981). See Falender, *Trusts and Decedents' Estates, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 415, 424 (1983).

¹⁴²421 N.E.2d at 648.

¹⁴³*Id.* at 650.

¹⁴⁴*Id.*

¹⁴⁵*Id.* at 649. See P-M Gas & Wash Co. v. Smith, 268 Ind. 292, 375 N.E.2d 592 (1978).

¹⁴⁶See IND. R. TR. P. 11(A).

¹⁴⁷516 F. Supp. 292 (N.D. Ind. 1981).

filed. The district court decided that during the pendency of an appeal, a district court may entertain a Rule 60(b) motion and deny the motion if it is without merit, or seek leave to remand from the federal court of appeals if it appears the motion should be granted.¹⁴⁸

Crumpacker conforms to the trend that a federal district court generally will not lack jurisdiction to entertain Rule 60 motions after an appeal has been filed.¹⁴⁹ This interpretation is inconsistent with the procedure in Indiana state courts. In the Indiana courts, once an appeal has been filed, relief pursuant to Indiana Trial Rule 60 must be sought first in the appellate court where the appeal is pending, not in the trial court.¹⁵⁰

5. *Appellate Jurisdiction.*—The landowners in *In re Little Walnut Creek Conservancy District*¹⁵¹ appealed from the trial court order affirming an appraiser's report which was unfavorable to the appellants' properties. The issue on appeal concerned a conflict between Indiana Code section 19-3-2-65 and the Appellate Rules. The appellants filed their appeal pursuant to the statute which allowed an appeal of the court's order to be made to the Indiana Supreme Court within thirty days.¹⁵² The court first noted that the provision of the statute that allowed the parties to appeal to the supreme court was superseded by Appellate Rule 4(B), which provided that appeals were to be taken to the court of appeals.¹⁵³ This result occurred because, when a statute conflicts with the trial or appellate rules, "the rules will take precedence and the conflicting phrases within the statute will be deemed without force and effect."¹⁵⁴

In determining the timeliness of filing the appeal, the court looked to Appellate Rule 3(B), which mandates the time for filing the record of proceedings in both interlocutory and final appeals, to determine if its provisions superseded the statutory time limit of thirty days. Appellate Rule 3(B) states that if a statute, pursuant to which an appellate review is filed, fixes a shorter time, the statutory time limit prevails.¹⁵⁵ The court of appeals observed that the statute, fixing a thirty-day period for filing an appeal, did not conflict with the Appellate Rule 3(B).¹⁵⁶ Rather, the court found that the statute controlled

¹⁴⁸*Id.* at 296.

¹⁴⁹*Id.* at 295-96 (citing *United States v. Ellison*, 557 F.2d 128, 132 (7th Cir.), *cert. denied*, 434 U.S. 965 (1977)).

¹⁵⁰See, e.g., *Donahue v. Watson*, 413 N.E.2d 974 (Ind. Ct. App. 1980); *Logal v. Cruse*, 167 Ind. App. 160, 338 N.E.2d 305 (1975).

¹⁵¹419 N.E.2d 170 (Ind. Ct. App. 1981).

¹⁵²IND. CODE § 19-3-2-65 (1976) (now codified at IND. CODE § 13-3-3-62(f) (1982)).

¹⁵³419 N.E.2d at 171; see IND. R. APP. P. 4(B).

¹⁵⁴419 N.E.2d at 171 (construing IND. R. APP. P. 4(B)(5)(c)). See also *State ex rel. Western Parks, Inc. v. Bartholomew County Court*, 270 Ind. 41, 383 N.E.2d 290 (1978).

¹⁵⁵See IND. R. APP. P. 3(B).

¹⁵⁶419 N.E.2d at 171.

in this case; therefore, the court held that the appeal was dismissed because it was untimely.¹⁵⁷ The practitioner is advised to be alert to statutory time limits for effecting appeals in Indiana.

G. 1982 Indiana Trial Rule Amendments

1. *Trial Rule 26: General Provisions Governing Discovery.*—Effective January 1, 1982, Indiana Trial Rule 26 was amended to conform with the Federal Rules of Civil Procedure, Rule 26. Indiana Trial Rule 26 was altered in sections (A), (B), (C), and (E). Federal Rule 26(f), which allows a discovery conference, was not recommended for adoption by the Rules Committee.¹⁵⁸ Although the Rule Committee did not contemplate that decisional law in Indiana would be affected significantly by the Trial Rule 26 amendments, there are several important changes which should be noted.¹⁵⁹

In addition to relocating some sections of Trial Rule 26,¹⁶⁰ the 1982 amendments changed the previous requirement that trial preparation materials could be discovered upon a showing of "good cause" to a two-part requirement. A party seeking discovery must now show substantial need and must show that he is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.¹⁶¹ With these changes, the Trial Rule more specifically spells out what is now required because these requirements were two elements of "good cause" under prior law.¹⁶² A new sentence was added to the section on trial preparation materials that protects "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party" from disclosure.¹⁶³ Thus, any previous Indiana decisions that did not protect an attorney's mental impressions are modified to that extent, and Indiana decisions will now follow recent federal cases construing this limitation.¹⁶⁴

The section on discovery of experts is now renumbered as Trial Rule 26(B)(4). Its contents were changed substantially so that several recent Indiana decisions are affected. Amended Trial Rule 26(B)(4)(a)

¹⁵⁷*Id.*

¹⁵⁸IND. CODE ANN., IND. R. TR. P. 26 Supreme Court Committee note (West Supp. 1982).

¹⁵⁹*Id.*

¹⁶⁰Section 26(B)(4) is now 26(B)(2) and the section on discovery of trial preparation material is now 26(B)(3). IND. R. TR. P. 26(B)(2), (3).

¹⁶¹IND. R. TR. P. 26(B)(3).

¹⁶²See *Newton v. Yates*, 170 Ind. App. 486, 497, 353 N.E.2d 485, 492 (1976).

¹⁶³IND. R. TR. P. 26(B)(3).

¹⁶⁴See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Duplan Corp. v. Moulinage Et Retorderie DeChavanoz*, 509 F.2d 730 (4th Cir.), *cert. denied*, 420 U.S. 997 (1975).

allows a party to seek through interrogatories not only the names of experts and the subject matter of their testimony, but also the facts and opinions to which the expert is expected to testify, thus modifying Indiana case law which limited discovery of facts and opinions of expert witnesses.¹⁶⁵

2. *Discovery Rules.*—a. *Trial Rule 33: Interrogatories to parties.*—Trial Rule 33(C) was amended to conform with Federal Rule 33(c) by adding a sentence at the end. Trial Rule 33(C) provided that when a party is served interrogatories that can be answered by examining business records, and the burden of obtaining the answer is the same for the party requesting the information as for the party served, it is permissible to answer by providing the requesting party access to the records and time to examine them. This option had been abused by answering parties who directed the requesting party to a large mass of business records without specifying where the information sought might be found.¹⁶⁶ The amendment now requires that the answering party specify by category and location, the records from which answers to interrogatories can be derived.¹⁶⁷

b. *Trial Rule 34: Production of documents.*—Trial Rule 34(B) was also amended by the addition of one sentence which conforms it to Federal Rule 34(b). The amendment requires that a party who produces documents in response to a request by the opposing party “produce them as they are kept in the usual course of business or . . . organize and label them to correspond with the categories in the request.”¹⁶⁸ This amendment, similar to the amendment to Trial Rule 33(C),¹⁶⁹ attempts to prevent abusive practices that make it difficult for the requesting party to find the information sought in the requested documents.¹⁷⁰

c. *Trial Rule 37: Sanctions.*—The amendment to Indiana Trial Rule 37, which was quite substantial, conformed the Indiana Rule to Federal Rule 37. The purpose of the amendment, according to the Rules Committee, was to “reinforce Indiana decisions in the area, and to clearly identify the enforcement power . . . of the Indiana trial court.”¹⁷¹

¹⁶⁵See, e.g., *Costanzi v. Ryan*, 370 N.E.2d 1333 (Ind. Ct. App. 1978); *State Highway Commission v. Jones*, 173 Ind. App. 243, 363 N.E.2d 1018 (1977).

¹⁶⁶IND. CODE ANN., IND. R. TR. P. 32(C) Supreme Court Committee note (West Supp. 1982).

¹⁶⁷IND. R. TR. P. 33(C).

¹⁶⁸IND. R. TR. P. 34(B).

¹⁶⁹See *supra* notes 166-67 and accompanying text.

¹⁷⁰IND. CODE ANN., IND. R. TR. P. 34(B) Supreme Court Committee note (West Supp. 1982).

¹⁷¹IND. CODE ANN., IND. R. TR. P. 37 Supreme Court Committee note (West Supp. 1982).

3. *Trial Rule 41: Provisions Governing Dismissal of Actions.*—Prior to the 1982 amendment, Indiana courts had consistently interpreted Trial Rule 41(B) to mean that the trial court, in determining whether to grant an involuntary dismissal, could consider only the evidence and inference most favorable to the nonmoving party, and that the trial court was not permitted to weigh the evidence.¹⁷² Under the standard adopted by the Indiana courts, a trial judge, when trial is to the court, could not disbelieve a *prima facie* case and find for the moving party who does not have the burden of proof. However, such a prohibition is inconsistent with the power of a jury to find against a party who has made a *prima facie* case.¹⁷³ In addition, this standard is inconsistent with Rule 41(b) of the Federal Rules of Civil Procedure, which permits the trial court to weigh the evidence and determine for whom the evidence preponderates.¹⁷⁴

The 1982 amendment to Trial Rule 41(B) corrected these inconsistencies. As amended, the rule now provides that the standard to be applied by the trial court is whether, "upon the weight of the evidence and the law there has been shown no right to relief."¹⁷⁵ The amendment makes clear that the trial court may weigh the evidence, may determine the credibility of witnesses, and may decide whether the plaintiff, or party with the burden of proof, has established a right to relief or defense during the case-in-chief.¹⁷⁶ The Rules Committee noted that all cases holding contrary to the new Trial Rule 41(B) standard were effectively overruled by the amendment.¹⁷⁷

4. *Trial Rule 75: Venue Requirements.*—As amended, Trial Rule 75 now allows interlocutory appeal of an order transferring or refusing to transfer a case under the venue provisions.¹⁷⁸ This amendment represents a complete change from the previous rule. It should be noted that the new provision expressly provides that an interlocutory appeal will not stay the trial court proceedings unless the trial or ap-

¹⁷²See, e.g., *Fielitz v. Allred*, 173 Ind. App. 540, 541-43, 364 N.E.2d 786, 787 (1977); *Building Systems, Inc. v. Rochester Metal Prods., Inc.*, 168 Ind. App. 12, 14, 340 N.E.2d 791, 793 (1976).

¹⁷³See *State ex rel. Peters v. Bedwell*, 267 Ind. 522, 527, 371 N.E.2d 709, 712 (1978) (jury may find against party with burden of proof who has established a *prima facie* case).

¹⁷⁴E.g., *Emerson Electric Co. v. Farmer*, 427 F.2d 1082 (5th Cir. 1970); *Ellis v. Carter*, 328 F.2d 573 (9th Cir. 1964).

¹⁷⁵IND. R. TR. P. 41(B). The amendment adopted the holding in *Ferdinand Furniture Co. v. Anderson*, 399 N.E.2d 799 (Ind. Ct. App. 1980).

¹⁷⁶IND. CODE ANN., IND. R. TR. P. 41 Supreme Court Committee note (West Supp. 1982).

¹⁷⁷*Id.* The committee note lists several cases which were overruled by the amendment, including *Fielitz v. Allred*, 173 Ind. App. 540, 364 N.E.2d 786 (1977) and *Building Systems, Inc. v. Rochester Metal Prods., Inc.*, 168 Ind. App. 12, 340 N.E.2d 791 (1976).

¹⁷⁸IND. R. TR. P. 75(E).

pellate court so orders. This provision conforms to the general rule on interlocutory appeals.¹⁷⁹

5. *Trial Rule 79: Special Judge Selection.*—The 1982 amendment modified subsections (4), (8), and (10) of Trial Rule 79. As amended, subsection (4) provides that each party in an adversary proceeding “shall” strike or move from the list of three prospective special judges submitted by the presiding judge.¹⁸⁰ The rule was amended in order to make clear that the parties are obligated to strike.¹⁸¹

Subsections (1), (6), and (7) provide for the appointment of a special judge by the Indiana Supreme Court under certain circumstances. As amended, subsection (8) no longer specifically designates particular courts to which subsections (1), (6), and (7) are inapplicable, but makes the supreme court’s appointment power inapplicable to any court from which an appeal is allowed to a circuit court or a court of coordinate jurisdiction.¹⁸² The amendment has the effect of making the supreme court’s power to appoint a special judge applicable to any court where orders or judgments may be appealed directly to the Indiana Supreme Court or the Indiana Court of Appeals.¹⁸³ As pointed out in the Committee note, statutes that permit direct appeal to the court of appeals from the Marion County Municipal Court¹⁸⁴ will have, as a result of the amendment to Trial Rule 79, the further effect of extending supreme court appointment of special judges to municipal and other lower courts.

Subsection (10) sets forth the time limits within which a presiding judge must take action to nominate a list of prospective special judges, and within which the parties must strike from that list.¹⁸⁵ The amendment to this subsection decreased the time within which the presiding judge is required to nominate the list and to submit it to the parties, after his attention has been called to the necessity for nomination, from three days to two days. The amendment also increased the time within which the parties must strike from two days to not less than seven nor more than fourteen days thereafter, as the judge may allow. These changes are in conformity with the time limits applicable to change of venue from the county.¹⁸⁶

This subsection also was amended to provide for contingencies in

¹⁷⁹See IND. R. APP. P. 4(B)(5)(c).

¹⁸⁰IND. R. TR. P. 79(4). The prior rule had read “may” strike.

¹⁸¹IND. CODE ANN., IND. R. TR. P. 79 Supreme Court Committee note (West Supp. 1982).

¹⁸²IND. R. TR. P. 79(8).

¹⁸³IND. CODE ANN., IND. R. TR. P. 79 Supreme Court Committee note (West Supp. 1982).

¹⁸⁴See, e.g., IND. CODE § 33-6-1-8 (1982).

¹⁸⁵IND. R. TR. P. 79(10).

¹⁸⁶See IND. R. TR. P. 76(9); IND. R. CRIM. P. 12.

the event either party fails to strike within the time allowed. If the moving party fails to strike, he is not entitled to a change of venue from judge, and the presiding judge reassumes jurisdiction in the case.¹⁸⁷ If the nonmoving party fails to strike, the clerk strikes for him.¹⁸⁸ The addition of these provisions is consistent with the amendment of subsection (4) and essentially states the result of failure to strike under prior case law.¹⁸⁹

¹⁸⁷IND. R. TR. P. 79(10).

¹⁸⁸*Id.*

¹⁸⁹See State *ex rel.* Goins v. Sommer, 239 Ind. 296, 299-300, 156 N.E.2d 885, 887 (1959).

IV. Commercial Law

GERALD L. BEPKO*

A. Scope of UCC Article 2

This year, in *Tousley-Bixler Construction Co. v. Colgate Enterprises, Inc.*,¹ the court of appeals had an opportunity to decide a case that may help clarify the differences between transactions in goods,² which are governed by Uniform Commercial Code (UCC) Article 2, and real property related transactions, which are governed by the common law of contracts. The case involved an alleged contract for the sale of 50,000 cubic feet of clay located approximately four to eight feet beneath the surface of the seller's property. Under the alleged agreement, the clay was to be removed by the buyer. Before any clay was removed, however, a dispute arose regarding the existence of the contract, and the seller filed suit. At the close of the trial, the trial judge instructed the jury on the subject of formation of contracts under both the common law of contracts and the Indiana version of UCC Article 2. The judge apparently intended the jury to decide first whether the alleged agreement was a transaction in goods or an ordinary contract, and then to apply the correct principles of law. The jury found for the seller. The buyer appealed the decision contending that a transaction in goods was not involved, and, thus, the trial judge erred in giving instructions under Indiana's version of UCC Article 2.³

An analysis of the trial judge's instruction should begin with an examination of UCC 2-105(a), which defines the term "goods" as "things . . . which are movable at the time of identification to the contract"⁴ including "things attached to realty as described in the section on goods to be severed from realty (section 2-107)."⁵ UCC 2-107 provides that "[a] contract for the sale of timber, minerals or the like . . . is a contract for the sale of goods . . . if they are to be severed [from the land] by the seller."⁶ If, however, they are to be severed

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¹429 N.E.2d 979 (Ind. Ct. App. 1982).

²U.C.C. § 2-102 provides that "this Article applies to transactions in goods." IND. CODE § 26-1-2-102 (1982).

³429 N.E.2d at 980.

⁴IND. CODE § 26-1-2-105(1) (1982).

⁵Id.

⁶Id. § 26-1-2-107(1). In an effort to make available the more streamlined financing provisions of UCC Article 9, there was a movement in timber growing states to have timber treated as goods regardless of whether the buyer or the seller removed the timber. The permanent editorial board followed the lead of the timber growing states and, in 1966, changed the language of UCC 2-107 to eliminate the word "timber" from subsection 1. A.L.I., THE OFFICIAL TEXT OF THE UNIFORM COMMERCIAL CODE app. II, § C, at 882 (West 1978). Indiana has not made this change.

by the buyer, the transaction resembles a lease of the real property and the transaction should be governed by the common law governing mineral leases. Using this formulation, the court concluded that the clay under the ground was a "mineral or the like" and thus, would constitute goods only if the seller was to remove the clay.⁷ Because the buyer in *Tousley-Bixler* was to remove the clay, the sale involved an ordinary contract, not a transaction in goods; therefore, the jury was not at liberty to apply the principles of UCC Article 2. Thus, the trial judge had erred in giving instructions to the jury under UCC Article 2.⁸

Although the appellate court in *Tousley-Bixler* concluded that the trial judge had given incorrect instructions, the question remained whether the error was harmless. To a great extent, the UCC is a codification of common law.⁹ Those portions of the UCC that are not codifications of common law are often applied by courts by way of analogy, or as a recognition of the fact that the UCC contains the most recent and authoritative exposition of commercial law.¹⁰ Professor Grant Gilmore called this use of the UCC "statutory radiation."¹¹ Thus, if the UCC either codifies, or is to be used in shaping, the common law, then there would be no harm in giving UCC instructions because there would be no difference between the UCC and the relevant common law. In *Tousley-Bixler*, however, the trial judge's instructions incorporated UCC 2-207, the "battle of the forms" section that makes a radical departure from the common law.¹²

Under UCC 2-207(1), a contract can be concluded by the exchange of documents, even if the documents contain different or additional terms. The common law doctrine provides that a responsive document containing different or additional terms does not form a contract but, instead, constitutes a counter offer.¹³ This difference between the common law and UCC 2-207(1) was too stark to permit the appellate court in *Tousley-Bixler* to conclude that the trial judge's error was harmless. Thus, the case was reversed and remanded for a new trial.¹⁴ Implicit in the court's holding is the assumption that there is to be no statutory

⁷429 N.E.2d at 982.

⁸*Id.* at 983.

⁹See generally Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 622-23 (1975) (suggesting that states were merely stating, rather than making, law when they adopted the UCC).

¹⁰See *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971); *Wagner Constr. Co. v. Noonan*, 403 N.E.2d 1144 (Ind. Ct. App. 1980).

¹¹1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 10.7, at 315 (1965).

¹²See J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 1-2 (2d ed. 1980).

¹³RESTATEMENT (SECOND) OF CONTRACTS § 59 (1979).

¹⁴429 N.E.2d at 983.

radiation from UCC 2-207(1) and that it should not be applied by analogy to shape the common law in Indiana.

B. Warranty Booklet Received After Sale

Generally, a written disclaimer or a modification of a warranty that is contained in a manufacturer's manual or booklet is not binding on a purchaser if the manual or booklet is received by the purchaser after a commitment to purchase has been made.¹⁵ This general dogma appears to be based on the assumption that the purchaser had not assented to the disclaimer; therefore, such disclaimers are ineffective, in the absence of proof that the purchaser assented to the terms of the booklet. This past year, in *Hahn v. Ford Motor Co.*,¹⁶ the court of appeals had occasion to examine the limits of this dogma in a most interesting case.

In *Hahn*, the buyers of an auto brought a suit for breach of warranty against the dealer, Lorey, and the manufacturer, Ford, claiming various defects in a 1977 Ford purchased from Lorey. Lorey counterclaimed for the balance due on the purchase price. At the jury trial, the trial court admitted into evidence the Ford warranty facts booklet, which contained modifications of the implied warranty of merchantability. Although implied warranties were acknowledged in the booklet, their duration was limited to the twelve month or twelve thousand mile duration of the express warranty. The purchasers, Mr. and Mrs. Hahn, claimed to have found this booklet in the glove box after taking delivery of the auto. Judgment was entered on the jury's verdict for Lorey on the counterclaim and against the Hahns on the warranty claim. The Hahns appealed contending that the trial court erred in admitting the booklet.¹⁷

The Hahns argued that the booklet was "inadmissible on evidentiary grounds because its relevance depended upon the existence of another conditioning fact—that it was part of the parties' contract."¹⁸ The appellate court, recognizing that the scope of its review was limited to the Hahns' argument, affirmed the trial court's decision.¹⁹

In reaching its decision, the appellate court pointed out that if the only basis for objection to the booklet was the question concerning the existence of a conditioning fact, then the trial court's role was

¹⁵J. WHITE & R. SUMMERS, *supra* note 12, § 12-5, at 446.

¹⁶434 N.E.2d 943 (Ind. Ct. App. 1982).

¹⁷Other issues on appeal included whether the trial court erred in admitting the warranty into evidence, in granting judgment in Ford's favor regarding punitive damages, in refusing to give one of the plaintiffs' instructions, and in failing to allow plaintiffs, as counter defendants, to assert rejection or revocation as a defense to Lorey's counterclaim. *Id.* at 946.

¹⁸434 N.E.2d at 948.

¹⁹*Id.* at 957.

limited to determining whether there was evidence "from which the ultimate fact finder could find the existence of the conditioning fact."²⁰ The conditioning fact was that the warranty disclosure "was part of the parties' contract,"²¹ presumably at the time the original sale agreement was struck. The appellate court explained that there was evidence in the trial record from which the jury could have found the existence of the conditioning fact; that is, that the Hahns were "cognizant of a 12,000 mile/12 month limitation on the duration of any implied warranties."²² Moreover, there was testimony that at the time of sale there was a discussion of an extended warranty plan. Although there was no specific testimony that a twelve month or twelve thousand mile limitation was discussed, the appellate court found that the trial court reasonably could have inferred that such a discussion took place. In order for there to be a discussion of the value of the extended warranty, there would have to have been some recognition of the limits on the basic express and implied warranties. On the basis of this evidence, the trial court could have concluded that Ford made a *prima facie* showing that the limitation was within the Hahns' knowledge at the time of sale. The appellate court held, therefore, that the trial court "did not err in admitting into evidence the booklet, which contained an identical limitation."²³

Throughout its discussion of this issue, the court of appeals was careful to point out that it was addressing only the narrow, evidentiary issue raised by the Hahns.²⁴ The court suggested that there may be a basis, if properly advanced, for excluding a warranty booklet such as the one in this case. The court, in dicta, stated that limitations contained in such a booklet are "ineffective as a matter of law" unless the parties assent to them, presumably after receiving the booklet.²⁵ This part of the *Hahn* opinion should be carefully examined by anyone representing a buyer who is confronted with limitations found in such a warranty booklet.

The court in *Hahn* also addressed the issue of the validity of the

²⁰*Id.* at 949 (citing C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 53 (E. Cleary 2d ed. 1972)).

²¹434 N.E.2d at 948.

²²*Id.* at 949.

²³*Id.* at 950.

²⁴The court stated:

This is quite a distinct argument than one which overtly attacks the effectiveness of a warranty limitation on sufficiency grounds, i.e., whether the evidence is sufficient to sustain an inference the parties consented to the terms of a warranty modification and limitation. We are, of course, limited in our scope of review and address only those issues properly raised by the parties.

Id. at 948.

²⁵434 N.E.2d at 948.

dealer's disclaimer. At the time of sale, Mr. Hahn signed a dealer's warranty disclaimer entitled "As Is, Manufacturers Warranty Only."²⁶ The language of the document was not quoted in the opinion, but the clear meaning of the document was that Lorey made no warranties and that the purchasers were to look exclusively to warranties made by Ford. This is a device commonly used by dealers in an effort to avoid product quality commitments. On appeal, the Hahns argued that the trial court erred in admitting this document into evidence. The court of appeals rejected the Hahns' arguments and confirmed the efficacy of the dealer's warranty disclaimer.²⁷ Implicit in the court's decision was the assumption that the reference in the dealer's disclaimer to the manufacturer's warranty was not sufficient to incorporate, by reference, the warranty booklet and its limitations.²⁸

C. Remedy Limitations

Remedy limitations are contract provisions that apportion risks in transactions.²⁹ A remedy limitation will usually come into play after some liability has been established, such as for breach of warranty. The contract provision may limit the remedy: by setting a particular remedy, such as repair or replacement of defective parts, as the exclusive remedy; by imposing conditions on remedies, such as giving notice within a certain time period; or by setting a maximum dollar amount on the damages that may be recovered.

During the past year, there were two cases in Indiana concerning remedy limitations. In one case, *General Bargain Center v. American Alarm Co.*,³⁰ the remedy limitation was enforced to limit the defendant's liability. In the other case, *Carr v. Hoosier Photo Suppliers, Inc.*,³¹ the remedy limitations were narrowly construed so that they did not operate to protect the defendant against full liability.

In *General Bargain Center*, the American Alarm Company (American) installed a burglar alarm system for General Bargain Center (General). Thereafter, a burglary was committed at General's premises and General lost \$19,000 in merchandise. General brought

²⁶*Id.* at 953.

²⁷*Id.* at 954.

²⁸For example, arguably, the manufacturer's limitations on warranty were incorporated by reference, by way of the documents signed at the time of sale. This result, however, would probably be inconsistent with the "conspicuous" requirements of U.C.C. § 2-316(2). IND. CODE § 26-1-2-316(2) (1982).

²⁹The U.C.C. § 2-719 deals with contractual modification or limitation of remedy. IND. CODE § 26-1-2-719 (1982).

³⁰430 N.E.2d 407 (Ind. Ct. App. 1982).

³¹422 N.E.2d 1272 (Ind. Ct. App. 1981). For a discussion of the bailment aspects of this case, see Krieger, *Property, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 283, 288 (1983).

a suit against American claiming that the loss was the result of American's failure to comply with the terms of the agreement. American defended on the ground that the clauses in the contract between General and American limited American's liability to \$250. On the front page of the written contract between General and American, the following language appeared immediately over the signatures of the parties:

The reverse of this agreement is incorporated herein. Please read carefully. We are not an insurer. Our maximum liability is limited to \$250.00. User acknowledges receipt of copy and that he has read and understands reverse side of agreement particularly Paragraph #9.³²

Paragraph 9 on the reverse side of the contract document contained similar language. In particular, Paragraph 9 stated that:

[I]f Company should be found liable for loss or damage due from a failure of Company to perform any of the obligations herein, including but not limited to installation, maintenance, monitoring or service or the failure of the system or equipment in any respect whatsoever, Company's liability shall be limited to a sum equal to the total of six (6) monthly payments or Two Hundred Fifty (\$250.00) Dollars, whichever is the lesser, as liquidated damages and not as penalty and this liability shall be exclusive . . .³³

The trial court relied on the language of these clauses to limit liability to the maximum amount of \$250 and entered summary judgment accordingly.³⁴ General appealed, and the court of appeals affirmed the trial court's decision, concluding that there were no issues of fact and that there was no basis for declaring the remedy limitations to be unenforceable.³⁵

Two additional matters should be noted in connection with this case. First, the court rejected the argument made on appeal that, because General did not understand the consequences of this remedy limitation, the limitation was unconscionable.³⁶ Although this contract agreement was not a transaction in goods, clearly the principle of unconscionability applies³⁷ and, presumably, the trial court should have followed the procedure in UCC 2-302.³⁸ The result on this issue in

³²430 N.E.2d at 410 (quoting contract).

³³*Id.* at 409 (quoting contract).

³⁴*Id.*

³⁵*Id.* at 412.

³⁶*Id.*

³⁷See *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971).

³⁸IND. CODE § 26-1-2-302 (1982) provides that as a matter of law, the trial judge makes

General Bargain Center points up the need for the party claiming unconscionability to request a hearing in the trial court on the issue of unconscionability, and then, at the hearing, the party should offer evidence of the commercial setting at the time of the agreement. This evidence should include evidence of any imbalance in bargaining power that may exist, evidence that the contract was an "adhesion contract" given without options as to whether to accept its terms, evidence of the harshness of the provision in dispute, or evidence that a term was obscure or not understood. Apparently, General did not request such a hearing, offered no such proof, and therefore, could not raise the issue on appeal. Moreover, if all the terms of UCC 2-302 apply, the issue of unconscionability, although similar to an issue of fact, is decided by the trial judge who must have some discretion in making determinations of unconscionability.

Secondly, the possibility that the contract clause in question operated as a liquidated damages clause did not seem fully developed by the court of appeals. A liquidated damages clause is a term that establishes a reasonable estimate of the actual injury that may be suffered as a result of a breach and sets that estimate as the stipulated recovery for breach.³⁹ Paragraph 9 of the contract in *General Bargain Center* refers to the stipulated amount of recovery as "liquidated damages."⁴⁰ If this language were intended to operate as a liquidated damages clause, it could be interpreted as providing a recovery of \$250 for any breach. Under this interpretation, it is possible that the clause is overly broad and could be void because it would operate as a penalty. For example, if American made some very minor error in performance of the contract, which did not cause any injury to General, this clause could be interpreted to accord General a right to recover \$250. Applied in this situation, because the \$250 recovery would bear no relation to any injury suffered by General, it would not be a reasonable estimate and, therefore, the clause would be unenforceable under common law restrictions on penalties.⁴¹ If this clause were unenforceable because it operated as a penalty in this situation, then serious questions could be raised concerning its enforceability as a remedy limitation.

a determination on the question of unconscionability, based on the circumstances existing at the time the contract was made. IND. CODE § 26-1-2-302(2) (1982) provides that "[w]hen it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making a determination." *Id.*

³⁹See generally E. FARNSWORTH, CONTRACTS § 1218, at 895 (1982); J. MURRAY, MURRAY ON CONTRACTS § 234, at 473 (2d rev. ed. 1974).

⁴⁰430 N.E.2d at 409.

⁴¹See E. FARNSWORTH, *supra* note 39, § 1218; J. MURRAY, *supra* note 39, § 234.

This analysis suggests the need for a drafting approach that carefully isolates and tests the operation of a clause, first, as a liquidated damages clause, and second, as a remedy limitation. In *General Bargain Center*, the clause functioned as a remedy limitation. To achieve that function and to avoid the problem raised in this Survey, a safer drafting approach would have been to state that American was responsible for any actual losses resulting from a breach up to a maximum of \$250. If there were specific breaches that the parties wished to be covered by a liquidated damages clause, the breaches should have been isolated and a reasonable estimate of loss recorded in the agreement.

The other case concerning a remedy limitation, *Carr v. Hoosier Photo Suppliers, Inc.*,⁴² is Indiana's first vacation film case. In that case, Carr, a lawyer, took a trip to Europe and used nine rolls of Kodak film to make a photographic record of the trip. Upon returning to the United States, he took the nine rolls to Hoosier Photo, which in turn sent them to Kodak for development. Four of these rolls were lost and never returned to Carr. Carr brought suit against Hoosier Photo and Kodak claiming losses associated with the expenses of the vacation. Both Hoosier Photo and Kodak claimed the benefit of the remedy limitations found on the boxes of film and on the receipt that was given to Carr when he gave his film to Hoosier Photo for development. The limitation on the receipt was as follows:

READ THIS NOTICE

Although film price does not include processing by Kodak, the return of any film or print to us for processing or any other purpose, will constitute an agreement by you that if any such film or print is damaged or lost by us or any subsidiary company, even though by negligence or other fault, it will be replaced with an equivalent amount of Kodak film and processing and, except for such replacement, the handling of such film or prints by us for any purpose is without other warranty or liability.⁴³

The statement on the box of film was as follows:

READ THIS NOTICE

This film will be replaced if defective in manufacture, labeling, or packaging, or if damaged or lost by us or any subsidiary company even though by negligence or other fault. Except for such replacement, the sale, processing, or other handling of

⁴²422 N.E.2d 1272 (Ind. Ct. App. 1981), *rev'd*, No. 2-476 A 124 (Ind. Nov. 12, 1982).

⁴³*Id.* at 1274.

this film for any purpose is without other warranty or liability.⁴⁴

Disregarding these limitations, the trial court awarded to the plaintiff a judgment for damages in the amount of \$1,013.60, and all parties cross-appealed.⁴⁵

The court of appeals had to decide whether either of the remedy limitations were effective to protect either defendant. In approaching this question, the court seemed guided by the principle that remedy limitation clauses are to be strictly construed and must be unambiguous in order to deprive a party of a remedy. This principle was borrowed from Indiana cases involving indemnification clauses.⁴⁶ The court stated that the reasoning of the cases dealing with indemnification clauses was applicable for both indemnification and remedy limitation clauses because both clauses protect a party from the consequences of negligence or breach.⁴⁷

1. *Hoosier Photo*.—Hoosier Photo claimed the benefit of the provision on the film box. The court made short work of this argument pointing out that Hoosier Photo was not a party to the sale of the film and could not rely on terms of a contract to which it was not a party.⁴⁸ The wording on the Hoosier Photo receipt was more troublesome. The court assumed that this receipt recorded the terms of the contract between Hoosier Photo and Carr, but concluded that the clause limited Hoosier Photo's liability only in the event film was "returned" to Hoosier Photo.⁴⁹ Thus, in this instance, the clause did not apply because Hoosier Photo "had never previously possessed the film."⁵⁰

2. *Kodak*.—Kodak also claimed the benefit of the provision on the film box. The court rejected this argument on the ground that the clause on the film box did not apply to film processing.⁵¹ The court reasoned that processing was an entirely separate transaction for which no payment was made at the time of purchase of the film. This reasoning led the court to conclude that the limitation clause applied only to defects in the film and, even more startling, that "any agreement concerning liability for losses during the processing transaction

⁴⁴*Id.*

⁴⁵*Id.* at 1275.

⁴⁶*Id.* at 1276-77 (citing *Vernon Fire and Casualty Ins. Co. v. Graham*, 166 Ind. App. 509, 336 N.E.2d 829 (1975); *Indiana State Highway Comm'n v. Thomas*, 169 Ind. App. 13, 346 N.E.2d 252 (1976)).

⁴⁷422 N.E.2d at 1276 n.2.

⁴⁸*Id.* at 1276.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.*

would have to be made when the arrangements for processing were made."⁵² It is unclear what policy supports this restriction on the right of the parties to allocate risks.

Finally, Kodak urged that it was protected by the language of the receipt. The court agreed that the receipt applied to the processing transaction⁵³ and acknowledged that the film had been "returned" to Kodak, thus, eliminating the obstacle encountered by Hoosier Photo. Nevertheless, the court concluded that the receipt offered no protection for Kodak in this case.⁵⁴ The receipt referred to "the return of any film or print to *us* for processing or any other purpose."⁵⁵ It was not clear to whom the pronoun "us" in the clause referred. According to the court, this ambiguity made it unclear which party was to be protected. Thus, the court refused the protection of the clause to Kodak. In searching for the clear meaning of the clause, the court did not appear to consider that the word "us" seems to have been intended to include all parties that played a role in the course of the film's processing, including Kodak, which was mentioned twice by name in the receipt.

The court's desire to construe strictly these remedy limitations is understandable. The purchaser of film and processing usually has no choice of terms, and the enforcement of the clauses would leave the purchaser without an effective remedy. Nevertheless, the effect of remedy limitations may be a matter better suited for legislative protection rather than a case-by-case judicial scrutiny of the terms.

The final issue in the *Hoosier Photo* case was raised by cross-challenges of the trial court's award of \$1,013.60 in damages. Both the defendants and the plaintiff contended that the award was contrary to the evidence. The plaintiff argued that the cost of the trip, \$6400, was the only evidence of injury and should have been the basis for the award. The defendants apparently argued that the cost of the trip was neither foreseeable nor based on circumstances of which the defendants had reason to know at the time of the contract and that the only compensable loss that the plaintiff proved was the cost of the film, \$13.60. The court of appeals disagreed with both challenges and affirmed the award.⁵⁶ The court noted that in Indiana the trial court has discretion in assessing damages,⁵⁷ and the court found that the trial judge's decision in this case was within the scope of proper

⁵²*Id.*

⁵³*Id.*

⁵⁴*Id.* at 1276-77.

⁵⁵*Id.* at 1277 (emphasis added by court).

⁵⁶*Id.* The supreme court reversed the award. *Hoosier Photo*, No. 2-476 A 124 (Ind. Nov. 12, 1982) (proper award was \$13.60, the cost of the film).

⁵⁷*Id.* (citing *Gene B. Glick Co. v. Marion Constr. Corp.*, 165 Ind. App. 72, 331 N.E.2d 26 (1975); *Smith v. Glesing*, 145 Ind. App. 11, 248 N.E.2d 366 (1969)).

discretion.⁵⁸ Without discussing issues of foreseeability, the court of appeals concluded that the trial judge could have used the total cost of the trip as a starting point and reduced this amount to take into account the benefit to Carr from the five rolls that were successfully developed and the other dimensions of enjoyment associated with the trip.

D. Buyer's Remedies

In *Michiana Mack, Inc. v. Allendale Rural Fire Protection District*,⁵⁹ the Indiana Court of Appeals addressed some interesting questions concerning remedies under UCC 2-714.⁶⁰ In that case, the defendant, Michiana, sold a fire truck to the Allendale Fire Protection District. The truck's motor regularly overheated. Allendale kept the truck, but filed suit seeking damages for breach of warranty. The trial court found that the truck was nonconforming and concluded that the appropriate remedy was to order Michiana to repair the truck or to refund the purchase price and, in either case, to pay damages including Allendale's expenses incurred for interest and insurance on the truck. Michiana appealed claiming that the trial court erred in fashioning the remedy. The court of appeals agreed with Michiana and reversed the trial court's decision pertaining to the remedy.⁶¹

The opinion of the court of appeals includes four important points. First, the appellate court provided a general interpretive gloss for UCC 2-714—the section that furnishes remedies for seller's breach when the buyer does not reject or revoke acceptance. UCC 2-714(1) provides that the buyer "may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach."⁶² This subsection is designed to deal with all forms of breach whether the breach pertains to the quality of the goods or to some other aspect of the seller's performance. This is why the drafters used the expression "any non-conformity." Accordingly, UCC 2-714(1) gives the courts broad discretion in fashioning a remedy for nonconformity.

UCC 2-714(2) provides:

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if

⁵⁸422 N.E.2d at 1278.

⁵⁹428 N.E.2d 1367 (Ind. Ct. App. 1981).

⁶⁰IND. CODE § 26-1-2-714 (1982).

⁶¹428 N.E.2d at 1369. The trial court's final order and judgment was reversed and vacated in part, and modified in part.

⁶²IND. CODE § 26-1-2-714(1) (1982).

they had been as warranted, unless special circumstances show proximate damages of a different amount.⁶³

This subsection deals with a more specific breach related to the quality of goods—a breach of warranty. The remedy for breach of warranty under UCC 2-714(2) is also more specific; it is the difference in the value of the goods as warranted and the value of the goods as accepted.⁶⁴ This difference can be measured by the cost of repair, by the fair market value of the goods as warranted less salvage value of the goods, or by the fair market value of the goods as warranted less the fair market value of the goods received.⁶⁵ Despite the more precise formula of UCC 2-714(2), special circumstances may dictate using a different method for computing the buyer's damages.

The second significant feature of *Michiana Mack* pertains to the trial court's order for Michiana to repair the truck. Specific performance or some other exercise of the court's equitable powers may be appropriate in some cases under UCC 2-714, but the appellate court pointed out that "before such powers are invoked, the court must assure itself that the party's legal remedies are inadequate."⁶⁶ In *Michiana Mack*, there was no evidence that the monetary remedies provided by UCC 2-714 were inadequate to put the buyer in the full performance position; thus, the appellate court found that the trial court's order was in error.⁶⁷

The third significant feature of *Michiana Mack* relates to the trial court's order for Michiana to refund the purchase price. UCC 2-714 does not authorize the use of the purchase price as a measure of recovery. Indeed, the predicate of UCC 2-714 is that the buyer must pay, or has paid, the purchase price and may sue for the specified losses.⁶⁸ UCC 2-717 provides that when the purchase price has not yet been paid, the buyer may, after proper notification, deduct from the price still due all or any part of the damages resulting from the breach.⁶⁹ In some cases, the measure of recovery computed by the formulae of UCC 2-714 may accidentally equal the purchase price. For example, the fair market value of the goods may be one hundred and ten percent of the contract price, and the salvage value may be ten percent of the contract price. The difference between the market value and the salvage value in such a case would equal the contract price.

⁶³*Id.* § 26-1-2-714(2).

⁶⁴*Id.*

⁶⁵428 N.E.2d at 1370 (paraphrasing these three suggestions for applying the formula of UCC 2-714(2) from J. WHITE & R. SUMMERS, *supra* note 12, § 10-2, at 377-81).

⁶⁶428 N.E.2d at 1371.

⁶⁷*Id.*

⁶⁸IND. CODE § 26-1-2-714(1) (1982); *see id.* § 26-1-2-607(1).

⁶⁹*Id.* § 26-1-2-717.

Nevertheless, the use of the contract price, as such, is not authorized by UCC 2-714 and the court of appeals held that the trial court had erred.⁷⁰

Finally, the appellate court found that the trial court had erred in awarding damages based on interest and insurance premiums paid on the truck.⁷¹ The general theory of recovery in the law of contracts and under the UCC provides that the nonbreaching party should be put in the position that she would have been in had the seller's performance been in conformity with the contract.⁷² This is called the full performance position and the formulae of UCC 2-714 are aimed at approximating this position. Ordinarily, the expenses that the buyer incurs, such as for interest or insurance on the goods, are contributions that the buyer has agreed to make to bring about, or to supplement, the full performance position. In other words, if the seller had fully performed, the buyer would have spent these amounts on insurance and interest to produce the desired result. To award additional damages specifically for insurance and interest would be to place the buyer in a position better than full performance and would be in contravention of the UCC's basic theory of recovery. The analysis may be different, however, if the buyer has rejected or revoked acceptance of the goods.⁷³

E. Amendments to the Indiana Deceptive Consumer Sales Act

The Indiana Deceptive Consumer Sales Act⁷⁴ serves as a basis for the Indiana Attorney General to seek relief on behalf of injured consumers against businesses engaged in deceptive practices. Unfortunately, there has been one area of uncertainty in the enforcement pattern: whether the Deceptive Consumer Sales Act applies to deceptive conduct in real property transactions such as those between landlord-tenant or to the solicitation and sale of real property. The Indiana Attorney General wanted to clarify this issue and to make certain that his enforcement powers extend to these transactions. At the same time, the real estate industry was concerned that a broad expansion of the scope of the Indiana Deceptive Consumer Sales Act would create a rash of private law suits by consumers who thought they had been deceived. The industry pointed out that consumers

⁷⁰428 N.E.2d at 1372.

⁷¹*Id.* at 1373.

⁷²See IND. CODE § 26-1-1-106(1) (1982).

⁷³See the discussion of *Coyle Chevrolet Co. v. Carrier*, 397 N.E.2d 1283 (Ind. Ct. App. 1979), in Bepko, *Contracts, Commercial Law, and Consumer Law, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 223, 229 (1981).

⁷⁴IND. CODE §§ 24-5-0.5-1 to -9 (1982).

already had rights under the common law to bring actions for deceptive conduct in real property transactions⁷⁵ and did not need the benefit of expanded coverage under the Deceptive Consumer Sales Act.

In the 1982 session, at the insistence of Attorney General Linley Pearson, the Indiana General Assembly addressed this area of uncertainty and the concerns of the real estate industry by amending the Indiana Deceptive Consumer Sales Act.⁷⁶ First, there was a change in the definition of the term "consumer transaction." Indiana Code section 24-5-0.5-2 now defines a consumer transaction as "a sale, lease, assignment . . . or other disposition of an item of personal property, real property, a service, or an intangible."⁷⁷ Second, to take into account the concerns of the real estate industry, the provisions of the Deceptive Consumer Sales Act that deal with private rights of action were amended by the addition of the following language: "This subsection does not apply to a consumer transaction in real property."⁷⁸

In addition to making clear that the Attorney General may proceed under the Act in real property transactions, the General Assembly added some language to the Act regarding the enforcement powers of the Attorney General. The subsection on Attorney General enforcement now provides:

c. The attorney general of Indiana may bring an action to enjoin a deceptive act. However, the attorney general may seek to enjoin patterns of incurable deceptive acts with respect to consumer transactions in real property. In addition, the court may order that supplier to [sic] make payment of the money unlawfully received from the aggrieved consumers to be held in escrow for distribution to aggrieved consumers.⁷⁹

The intent of this added language appears to be to restrict the type of suits in which the Attorney General may seek injunctions. In a real property transaction, an injunction may be sought only when there are "patterns of incurable deceptive acts."⁸⁰ An incurable deceptive act is a deceptive act that is part of a scheme, artifice, or device used with intent to defraud or mislead.⁸¹ Thus, before seeking an

⁷⁵See, e.g., *Herbert v. Stanford*, 12 Ind. 503 (1859) (recovery of purchase money paid is allowed when sale rescinded for fraud or misrepresentation); *Yost v. Shaffer*, 3 Ind. 331 (1852) (action for rescission is proper when vendor has been guilty of fraud); *Bolds v. Woods*, 9 Ind. App. 657, 36 N.E. 933 (1893) (action for damages permitted for misrepresentation by the vendor of land).

⁷⁶Act of Feb. 25, 1982, Pub. L. No. 152, 1982 Ind. Acts 1115.

⁷⁷IND. CODE § 24-5-0.5-2(1) (1982). See also *id.* § 24-5-0.5-2(4).

⁷⁸*Id.* § 24-5-0.5-4(a), (b).

⁷⁹*Id.* § 24-5-0.5-4(c) (emphasis added).

⁸⁰*Id.*

⁸¹*Id.* § 24-5-0.5-2(7).

injunction in real property transactions, the Attorney General must show a pattern of *intentionally* deceptive conduct. Apparently, in other transactions the Attorney General may seek an injunction without showing a pattern of deceptive conduct or without showing an intent to deceive. The added language also makes it clear that a court, at the request of the Attorney General, may order a supplier to make restitution of the money that was unlawfully received from aggrieved consumers. The money is to be held in escrow for distribution to aggrieved consumers. This relief appears to be available in all transactions and does not appear to be limited to real property transactions.

Finally, the Deceptive Consumer Sales Act was amended to add a new type of deceptive act to the long list of deceptive acts already found in the Act. It is now a deceptive act to represent that a "replacement or repair . . . is authorized by the consumer if the consumer has not authorized the replacement or repair, and if the supplier knows or should reasonably know that it is not authorized."⁸² This language gives the consumer a remedy in addition to the common law defense to an action for the price of the unauthorized repair work. In a suit for the price of unauthorized repairs, the consumer would have a defense based on the lack of authorization.⁸³ Now, in addition, the consumer will be able to claim that the unauthorized repair is a violation of the Deceptive Consumer Sales Act.

F. Amendments to Indiana's Uniform Consumer Credit Code

The 1982 Indiana General Assembly enacted some significant amendments to Indiana's version of the Uniform Consumer Credit Code (UCCC).⁸⁴ The purpose of these amendments is to remove some commercial transactions from coverage of the UCCC and to increase the permissible credit service charge that may be imposed in consumer credit transactions.

Although, in general, the UCCC was drafted to protect persons to whom credit is extended in consumer transactions,⁸⁵ some non-consumer transactions were included in the 1968 Official Text, which was adopted by Indiana.⁸⁶ As originally enacted, Indiana Code section

⁸²*Id.* § 24-5-0.5-3(a)(14).

⁸³See *Deck v. Jim Harris Chevrolet-Buick*, 386 N.E.2d 714 (Ind. Ct. App. 1979) (holding that the automobile dealer was limited to a \$50 recovery for a \$134.40 bill because the customer had agreed to pay only \$50 for the repair).

⁸⁴Act of Feb. 24, 1982, Pub. L. No. 149, 1982 Ind. Acts 1101. IND. CODE §§ 24-4.5-1-101 to -6-203 (1982) contain Indiana's version of the UCCC.

⁸⁵See IND. CODE § 24-4.5-1-102(2) (1982).

⁸⁶Act of Mar. 5, 1971, Pub. L. No. 366, 1971 Ind. Acts 1557. See U.C.C.C., 7 U.L.A. 253 (1978) for the 1968 Official Text.

24-4.5-2-602 identified and defined a "consumer related sale" and provided certain protection for the credit buyer in such sales.⁸⁷ Prior to the amendments, a consumer related sale was a sale not exceeding a price of \$25,000, that was to a person other than an organization, or that was secured by an "interest in a one or two family dwelling occupied by a person related to the debtor."⁸⁸ The protection for the debtor included limits on the permissible credit service charge. For example, in a consumer related sale "the parties may contract for the payment by the buyer of . . . a credit service charge not in excess of eighteen percent."⁸⁹ Similarly, Indiana Code section 24-4.5-3-602 identified a consumer related loan and provided the same protection for borrowers in those transactions.⁹⁰ The purpose of these provisions was to accord some protection to sole proprietors in small transactions, even though the credit sale or loan was not for a personal, family, or household purpose.⁹¹ The premise was that small business debtors needed the same protection as consumers in small transactions.

Apparently, this protection was unwise. Often, high risk business debtors were prevented from obtaining credit because financial institutions could simply not afford to extend credit within the limits permitted by the UCCC for consumer related sales or loans. Both small businesses and financial institutions argued that these small business purpose loans should be excluded from the restrictions of the UCCC.

The Conference of Commissioners on Uniform State Laws responded by omitting the concepts of consumer related sales and loans from the 1974 Official Text of the UCCC.⁹² The 1982 Indiana General Assembly also responded to this concern.⁹³ It amended Indiana Code section 24-4.5-1-202, the UCCC exclusion section, by adding language that excludes all credit sales and loans that are for other than personal, family, household, or agricultural purpose.⁹⁴ Now, *all* business or nonconsumer sales and loans, including those that fit the

⁸⁷See Act of Mar. 5, 1971, Pub. L. No. 366, § 3, 1971 Ind. Acts 1557, 1607.

⁸⁸IND. CODE § 24-4.5-2-602(1) (Supp. 1981) (current version at *id.* § 24-4.5-2-602(1) (1982)).

⁸⁹*Id.* § 24-4.5-2-602(2) (1976) (current version at *id.* § 24-4.5-2-602(2) (1982)). In addition, section 24-4.5-2-602(3) limits the credit service charge for consumer related sales made pursuant to a revolving charge to the same limit that applies to consumer sales that involve revolving charge accounts.

⁹⁰*Id.* § 24-4.5-3-602(2), (2.5) (1976) (current version at *id.* § 24-4.5-3-602(2) (1982)).

⁹¹See U.C.C.C. § 2.602 comment 1, 7 U.L.A. 393 (1978); IND. CODE ANN. § 24-4.5-2-602 comment 1 (West 1980); U.C.C.C. § 3.602 comment 1, 7 U.L.A. 472 (1978); IND. CODE ANN. § 24-5.5-3-602 comment 1 (West 1980).

⁹²The 1974 Official Text expressly provides for no limit on finance charges for nonconsumer credit transactions. U.C.C.C. § 2.601 & comment 1 (1974 version), 7 U.L.A. 695-96 (1978).

⁹³See Act of Feb. 24, 1982, Pub. L. No. 149, §§ 3, 6, 1982 Ind. Acts 1101, 1102, 1105.

⁹⁴Act of Feb. 24, 1982, Pub. L. No. 149, § 2, 1982 Ind. Acts 1101, 1102 (codified at IND. CODE § 24-4.5-1-202(7) (1982)).

definition of consumer related sales or loans, are outside the coverage of the UCCC.

Nevertheless, the Indiana Code sections dealing with consumer related credit sales and loans still have some application. To see how this may be so, it must be recognized that the credit sales and loans governed by the UCCC, generally, are those sales and loans made by persons who regularly extend credit. For example, Indiana Code section 24-4.5-2-104 provides that a consumer credit sale is a sale in which credit is granted by a person regularly engaged as a seller in credit transactions of the same kind.⁹⁵ Similarly, Indiana Code section 24-4.5-3-104 provides that a consumer loan is "a loan made by a person regularly engaged in the business of making loans."⁹⁶ Therefore, credit sales or loans made by persons not in the business of making sales or loans are *not* consumer credit sales or consumer loans, even if they are made for personal, family, or household purposes. In these transactions, the buyer or borrower would not have the benefit of the UCCC protections that are applicable to consumer credit sales or loans. It is in these transactions that the consumer related sale and loan provisions come into play. These transactions, although not within the definition of consumer credit sales or loans, may be within the definition of consumer related sales or loans. For the transactions to be considered "consumer related," the seller or lender is not required to be regularly engaged in that activity.⁹⁷

It should be noted that because business or nonconsumer credit sales and loans are fully excluded from the UCCC,⁹⁸ the consumer related credit sale and loan provisions will not apply to any business loans, but only to consumer credit sales and consumer loans that are made by persons who are not regularly engaged in the business of extending credit. These provisions will continue the protection provided by the UCCC for persons who borrow or receive extensions of credit in transactions that are made by casual lenders such as real estate brokers and some retail stores. This application of the UCCC provisions, however, has the possible vice of creating restrictions in small family loans in which the parties would not expect, or be likely to be aware of, the restrictions.

The other major change in the UCCC involves permissible credit service charges. Retailers had argued that high interest rates and inflation made the maximum rates permitted under the UCCC too restrictive. The Indiana General Assembly responded by providing increased flexibility in service charge rates.⁹⁹ Creditors will now be allowed to

⁹⁵IND. CODE § 24-4.5-2-104 (1982).

⁹⁶*Id.* § 24-4.5-3-104.

⁹⁷See *id.* §§ 24-4.5-2-602(1), -3-602(1).

⁹⁸See *supra* text accompanying note 94.

⁹⁹Act of Feb. 24, 1982, Pub. L. No. 150, §§ 1-7, 1982 Ind. Acts 1107.

impose finance charges that produce an annual percentage rate of twenty-one percent, or one and three-quarters percent monthly, on outstanding balances.¹⁰⁰ This increased flexibility has also been provided for deferral charges involving consumer related sales and loans,¹⁰¹ although, as mentioned above, the concept of consumer related credit will have a much narrower application.

¹⁰⁰IND. CODE §§ 24-4.5-2-207(3), -3-201(1), -3-201(4) (1982).

¹⁰¹*Id.* §§ 24-4.5-2-604(1)(b), -3-604(1)(b).

V. Constitutional Law

CARLYN E. JOHNSON*

A. Equal Protection

1. *Abortion Regulation.*—In *Indiana Hospital Licensing Council v. Women's Pavilion of South Bend, Inc.*,¹ the Indiana Court of Appeals affirmed the trial court's decision that an Indiana statute² requiring the licensing of ambulatory outpatient surgical centers was unconstitutional as applied to first trimester abortion clinics.

The Indiana Hospital Licensing Council sought to enjoin the operation of Women's Pavilion of South Bend, a first trimester abortion clinic, on the grounds that it was operating without a license in violation of a state statute that required the licensing of all ambulatory outpatient surgical clinics.³ Women's Pavilion argued that the statute, as applied, unduly burdened a woman's decision to control her own body by having an abortion during the first trimester of pregnancy and, therefore, was a violation of both equal protection and due process.

In addition to this constitutional argument, Women's Pavilion contended that application of the licensing statute to first trimester abortion clinics was contrary to the legislative intent of the statute. In *Arnold v. Sendak*,⁴ the federal district court declared as unconstitutional a portion of an Indiana statute⁵ that made abortion a criminal act unless performed in a hospital or a licensed health facility. The Indiana General Assembly subsequently amended the criminal statute to delete the unconstitutional section.⁶ Women's Pavilion argued that the deletion in the criminal statute indicated that the legislature did not intend the licensing statute to apply to first trimester abortion clinics. Therefore, the first issue before the court in *Licensing Council* was one of legislative intent.

The State argued that deletion of the statutory provision making abortion a criminal act unless performed in a hospital or a licensed health facility meant only that the state may not require performance

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¹420 N.E.2d 1301 (Ind. Ct. App. 1981).

²IND. CODE § 16-10-1-7 (1982); *see also id.* § 16-10-1-6(b).

³*Id.* § 16-10-1-7.

⁴416 F. Supp. 22 (S.D. Ind.), *aff'd*, 429 U.S. 968 (1976).

⁵IND. CODE § 35-1-58.5-2(a)(1) (1976) (amended 1978). A hospital or licensed health facility is defined in IND. CODE § 16-10-4-2 (1982) (the definition referred to in *Sendak* was previously codified at *id.* § 16-10-2-1 (1976)).

⁶Act of March 9, 1978, Pub. L. No. 143, 1978 Ind. Acts 1311 (codified at IND. CODE § 35-1-58.5-2 (1982) (amending IND. CODE § 35-1-58.5-2(a) (1976))).

of an abortion in a "hospital" or "health facility licensed under Indiana Code section 16-10-2," the latter being a facility providing medical care longer than 24 hours.⁷ Therefore, in the State's view, abortions could be required to be performed in licensed outpatient facilities. The court quickly disposed of the State's argument, pointing out that ambulatory outpatient surgical centers are included within the statutory definition of "hospital."⁸ Therefore, the court found that the legislature's "deletion of that portion of the statute providing for the performance of an abortion in a hospital effectively deleted the requirement that an abortion be performed in an ambulatory out-patient surgical center"⁹ Because the appellate court ultimately found that the application of the licensing statute to abortion facilities was unconstitutional, the court declined to analyze further the effect of the partial repeal of the criminal abortion statute.¹⁰

In holding that the Indiana licensing statute imposed an unconstitutional burden on a woman's decision concerning abortion, the appellate court examined a number of cases dealing with regulations burdening a woman's decision to abort.¹¹ The court acknowledged that since 1972 when the United States Supreme Court decided *Roe v. Wade*¹² and *Doe v. Bolton*,¹³ a woman's right to have an abortion is considered a "fundamental right which is subject to state regulation during the first trimester only upon a showing of compelling state interest."¹⁴

In examining the case before it, the court in *Licensing Council* initially noted that the Courts of Appeals for the Sixth and Seventh Circuits have held that over-regulation of personnel and facilities re-

⁷420 N.E.2d at 1309.

⁸*Id.* (quoting IND. CODE § 35-1-58.5-1(c) (1976)).

⁹420 N.E.2d at 1309.

¹⁰*Id.* at 1310.

¹¹*Id.* at 1310-15. *E.g.*, *Harris v. McRae*, 448 U.S. 297 (1980) (Hyde Amendment held not unduly burdensome because state is under no obligation to remove the pre-existing barrier of poverty); *Maher v. Roe*, 432 U.S. 464 (1977) (Connecticut regulation prohibiting funding of elective abortions but allowing state subsidy of childbirth held not unduly burdensome because it simply encouraged alternative to abortion and did not impose any restrictions); *Connecticut v. Menillo*, 423 U.S. 9 (1975) (Connecticut statute prohibiting abortion to be performed by non-physician held not unduly burdensome); *Doe v. Bolton*, 410 U.S. 179 (1973) (Georgia statutory provision limiting performance of abortion to hospitals licensed by a particular private organization found unduly burdensome); *Mahoning Women's Center v. Hunter*, 610 F.2d 456 (6th Cir. 1979) (city ordinance imposing medical and building code regulations on first trimester abortion clinics held unduly burdensome); *Friendship Medical Center, Ltd. v. Chicago Bd. of Health*, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975) (Chicago regulation regarding personnel and facilities required for performance of abortion held unduly burdensome).

¹²410 U.S. 113 (1973).

¹³410 U.S. 179 (1973).

¹⁴420 N.E.2d at 1314.

quired for abortion performance impinges upon a fundamental right.¹⁵ The court also examined the trend begun in 1977 with *Maher v. Roe*¹⁶ of "distinguishing between impermissible direct state burdens on the abortion decision and permissible state encouragement of an alternative" to abortion.¹⁷ The court found that: "Although a state may not impose unwarranted regulations directly interfering with access to abortions, it is not obliged to utilize its legislative power to remove pre-existing non-governmental restrictions on a woman's access to abortions."¹⁸

Applying these principles, the court in *Licensing Council* held that the Indiana licensing statute, as applied to first trimester abortion clinics, directly burdened the woman's fundamental decision.¹⁹ Women's Pavilion testified that compliance with the licensing statute would cause most of the first trimester abortion clinics to "'either raise their fees tremendously so the procedure would not be available or else they would be forced to close,'"²⁰ thus making abortion less available. Therefore, the court found that "the hurdle obstructing a woman's access to a first trimester abortion is not a preexisting one but is a direct product of governmental interference."²¹

Because the Indiana licensing statute directly burdened a fundamental right, the statute was unconstitutional unless justified by a compelling state interest. The state failed to demonstrate a compelling interest behind the licensing regulations. To the contrary, the appellate court was persuaded that, given the extremely low complication and mortality rates for first trimester abortions, there was not only a lack of compelling need, but no need for compliance with many of the statutory licensing requirements.²² While acknowledging "without hesitation" the State's valid interest in promoting maternal health, the court concluded that the Indiana statute was not narrowly drafted to serve that interest.²³ Because testimony of the witnesses

¹⁵420 N.E.2d at 1311-12 (citing *Mahoning Women's Center v. Hunter*, 610 F.2d 456 (6th Cir. 1979); *Friendship Medical Center, Ltd. v. Chicago Bd. of Health*, 505 F.2d 1141 (7th Cir. 1974), cert. denied, 420 U.S. 997 (1975)).

¹⁶432 U.S. 464 (1977).

¹⁷420 N.E.2d at 1312.

¹⁸*Id.*

¹⁹*Id.* at 1319.

²⁰*Id.* at 1308 (quoting the testimony given by Dr. Streeter).

²¹420 N.E.2d at 1313.

²²*Id.* at 1317-18. The statutory requirements include hallway space, on-site blood supplies, defibrillator, cardiac monitor, and emergency electrical generator. IND. CODE § 16-10-1-6(b) (1982).

²³420 N.E.2d at 1318-19. The issue is still a very current one. On May 24, 1982, the United States Supreme Court agreed to hear three more cases concerning just how far states may go in regulating abortions. See *Simopoulos v. Virginia*, 211 Va. 1059, 277 S.E.2d 194, *review granted*, 50 U.S.L.W. 3927 (U.S. May 24, 1982) (No. 81-185);

from both sides showed no need to apply the vast majority of the licensing requirements to first trimester abortion clinics, the court held that the State had failed to show a compelling state interest.²⁴

In so holding, the court flatly rejected what was essentially an equal protection argument by the plaintiff, who claimed that the licensing regulations could withstand constitutional scrutiny because they were "abortion neutral" and applied to all surgical procedures involving a similar degree of risk. The court noted that, although the regulation scheme appeared to be neutral, its enforcement was not.²⁵ In illustrating the exceedingly disproportionate impact the regulations had on abortion, the court pointed out that eight of the state's non-outpatient ambulatory surgical centers performed first trimester abortions, and seven of them performed such abortions exclusively.²⁶ Moreover, the court held that "'any proposed regulation, even if applied universally to all similar medical procedures, because of the fundamental right of a woman to procure an abortion during the first trimester, would have to meet a compelling governmental interest requirement.'"²⁷

Thus, although the Indiana court acknowledged that a state may require that a first trimester abortion clinic be licensed, the licensing requirements may only require compliance with general regulations such as maintenance of sanitary facilities, building code standards, and the like, unless the state can clearly show a compelling interest for further regulations.²⁸ Because the State failed to demonstrate a compelling interest in *Licensing Council*, the licensing scheme, as applied to the first trimester abortion clinics, was unconstitutional.

2. *Affirmative Action*.—In *Lehman v. Yellow Freight System, Inc.*,²⁹ the Court of Appeals for the Seventh Circuit affirmed the district court's decision that a white male plaintiff's civil rights were violated when a less qualified black male, rather than the plaintiff, was hired pursuant to an informal affirmative action plan. At trial, the evidence showed that Lehman, the white plaintiff, and Tidwell, the black male who was hired, were both casual or temporary employees of Yellow Freight. Tidwell, unlike Lehman, did not possess a chauffeur's license

City of Akron v. Akron Center for Reproductive Health, Inc., 651 F.2d 1198 (6th Cir. 1981), *review granted*, 50 U.S.L.W. 3928 (U.S. May 24, 1982) (No. 81-746); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 664 F.2d 687 (8th Cir. 1981), *review granted*, 50 U.S.L.W. 3928 (U.S. May 24, 1982) (No. 81-1623).

²⁴420 N.E.2d at 1319.

²⁵*Id.* at 1315.

²⁶*Id.*

²⁷*Id.* (emphasis added by court) (quoting *Friendship Medical Center, Ltd. v. Chicago Bd. of Health*, 505 F.2d 1141, 1153-54 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975)).

²⁸420 N.E.2d at 1318.

²⁹651 F.2d 520 (7th Cir. 1981).

at the time he was hired, although he did obtain one immediately thereafter. Additionally, while Lehman was an experienced driver, Tidwell did not have any driving experience and required some on-the-job training. The evidence also indicated that Yellow Freight had a self-imposed minority increase quota for its Muncie, Indiana terminal, but that the Muncie manager who hired Tidwell was unaware of the quota. The manager, however, did testify that race was a factor in Tidwell's hiring.

Lehman, relying on *Regents of the University of California v. Bakke*,³⁰ attempted to show that Tidwell was hired pursuant to a quota system which violated Lehman's civil rights.³¹ However, both the district and appellate courts based their decisions on *United Steel Workers of America v. Weber*.³² In *Weber*, the United States Supreme Court held that a plan giving preferential treatment to black workers until the percentage of black workers in the plant in question equalled the percentage of black workers in the area's work force did not violate Title VII of the Civil Rights Act of 1964.³³

Because Yellow Freight's manager did not hire Tidwell with the Yellow Freight quota plan in mind, the court refused to determine whether the company's quota plan was valid.³⁴ Rather, the *Lehman* court looked directly to the manager's hiring decision and stressed the need for the manager's hiring decision to be based on some indication that the present discrimination was necessary to remedy past discrimination, or, at the least, to minimize a statistical disparity between the racial compositions of the local labor force and the employer's work force.³⁵ Additionally, the court in *Lehman* held that there must be some time limit on preferential hiring decisions and found these minimum requirements to be lacking in the manager's decision.³⁶ Even though the action of Yellow Freight's manager had the effect of making the Muncie terminal's minority representation almost equal to the representation in the local work force, the hiring was not done with that goal in mind. Therefore, although the court indicated that it did not wish its decision to be understood as a set back for affirmative action plans, it held that the preferential hiring was a violation of Lehman's civil rights.³⁷ A plan lacking the *Weber*

³⁰438 U.S. 265 (1978).

³¹Lehman alleged that the hiring quota violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1976) and violated 42 U.S.C. § 1981 (1976).

³²433 U.S. 193 (1979). The *Weber* decision was handed down after *Lehman* was filed, but before the district court issued its opinion.

³³*Id.* at 197; see 42 U.S.C. § 2000(e) (1976).

³⁴651 F.2d at 524, 526 n.13.

³⁵*Id.* at 527.

³⁶*Id.* at 528.

³⁷*Id.*

requirements, the court said, would pose "serious dangers for the rights of non-minority applicants."³⁸

Lehman indicates that an individual hiring decision must meet the requirements set forth in *Weber*, even if a valid formal affirmative action plan exists. This requirement could cause extensive litigation because it will be much easier to challenge an individual's hiring decision than a formal plan; likewise, proving an individual's intent will be much harder than proving the requirements of a plan.

3. *School Desegregation*.—In March, 1982, the Court of Appeals for the Seventh Circuit handed down another decision in the fourteen-year-old Indianapolis Public Schools desegregation case.³⁹ In *United States v. Board of School Commissioners of Indianapolis*,⁴⁰ the appellate court affirmed the trial court's order that the State of Indiana pay the entire cost of remedying the interdistrict violations of black students' constitutional rights. The Seventh Circuit agreed with the district court's finding that the state alone was liable for the interdistrict violations⁴¹ and, therefore, should pay the entire cost of remediating them.

The State argued that the Indiana "Transfer Statute"⁴² should be applied to interdistrict busing. The statute provides that the State shall pay one half of the cost of transportation ordered by a court if the school has practiced de jure segregation, if a unitary school system cannot be implemented within the boundaries of the school corporation, and if the court orders students transferred to another school corporation to effect a desegregation plan acceptable within the meaning of the fourteenth amendment.⁴³ However, the court of appeals held the transfer statute to be inapplicable to the present case because the statute applies only to a transferor school corporation practicing de jure segregation.⁴⁴ The interdistrict constitutional violations in this

³⁸*Id.*

³⁹See *United States v. Board of School Comm'r's of Indianapolis*, 677 F.2d 1185 (7th Cir. 1982). For a review of the complicated history of this case, see Note, *Indianapolis Desegregation: Segregative Intent and the Interdistrict Remedy*, 14 IND. L. REV. 799, 803-10 (1981).

⁴⁰677 F.2d 1185 (7th Cir. 1982).

⁴¹*Id.* at 1188. The state was found liable because the Uni-Gov statute adopted by the Indiana General Assembly in 1969 excluded the school corporations in the Marion County suburbs from consolidation, and because the Housing Authority of Central Indiana, a state agency, had refused to put public housing, which would be occupied largely by blacks, outside the Indianapolis Public School District's boundaries. *Id.* at 1190-91 (Posner, J., dissenting).

⁴²IND. CODE §§ 20-8.1-6.5-1 to -10 (1982). The statute was enacted at the suggestion of the trial judge in the earlier stages of the *Indianapolis* case. 677 F.2d at 1190 (Posner, J., dissenting).

⁴³IND. CODE §§ 20-8.1-6.5-1 to -10 (1982).

⁴⁴677 F.2d at 1187.

case were attributable solely to the State, rather than to the Indianapolis school district or to any of the suburban school districts. Therefore, the court held that the State, as wrongdoer, must pay the costs of the remedy.⁴⁵

Additionally, the State raised the more interesting question of the extent and the appropriateness of federal court intervention in the processes of state government. The district court order provided not only that the State must pay for the desegregation remedy, but required that the payment should come first from any unappropriated state funds. Further, the district court order provided that any payment made should not reduce the amounts to which a school, whether a party to the suit, would otherwise be entitled to under state law.⁴⁶

On appeal, the State argued that the district court order was an improper invasion of its sovereignty and, therefore, was contrary to the tenth amendment which explicitly reserves nondelegated powers to the states. The court of appeals disagreed, however, stating that a court, acting in equity, has the power to fashion a remedy for violations of the federal Constitution.⁴⁷ The appellate court rejected the State's reliance on *Evans v. Buchanan*,⁴⁸ which prevented a federal court from setting a level of taxation different from that established by the state. The *Indianapolis* court found *Evans* to be inapplicable because the district court's order in *Indianapolis* had not attempted to restructure state or local taxes.⁴⁹ Rather, the federal court had simply ordered the state to pay the "costs of remedying its wrongdoing" which a court may do by "reallocat[ing] appropriations for other governmental functions, or rais[ing] taxes."⁵⁰

Because of the finding that only the State was guilty of the inter-district violations, the court also rejected the State's argument that the suburban Marion County schools were liable for constitutional violations and should share the remedying costs.⁵¹

However, in a dissenting opinion, Judge Posner stated that the

⁴⁵*Id.* at 1190. In fact, the court went on to state that the "Transfer Statute" no longer makes sense because one of the conditions which triggers implementation of the statute is that a unitary school system cannot be implemented within the boundaries of the school corporation. *Id.* at 1186-87 (citing IND. CODE § 20-8.1-6.5-1 (1982)). However, the court of appeals noted that a decision handed down after the adoption of the Transfer Statute, held, in essence, that "a unitary school system can always be established within the geographical boundaries of the school district that committed the *de jure* segregation." 677 F.2d at 1187 (citing *Milliken v. Bradley*, 418 U.S. 717, 745-46 (1974)).

⁴⁶677 F.2d at 1189.

⁴⁷*Id.* at 1188 (citing *Milliken v. Bradley*, 433 U.S. 267, 281 (1977) (*Milliken II*)).

⁴⁸582 F.2d 750 (3rd Cir. 1978).

⁴⁹677 F.2d at 1188.

⁵⁰*Id.* at 1190.

⁵¹*Id.* at 1188.

court should leave the responsibility for deciding who should bear the costs of financing the desegregation order to the State.⁵² Judge Posner postulated that the legislative representatives of the suburban Marion County white voters procured the school exception in the Uni-Gov statute,⁵³ and without that action no interdistrict busing order would have been necessary. Nevertheless, the majority found that only the State was guilty of interdistrict constitutional violations;⁵⁴ therefore, only the State was required to pay.

B. First Amendment—Freedom of Speech

In *Perry Local Educators' Association v. Hohlt*,⁵⁵ a case of first impression within the circuit, the Court of Appeals for the Seventh Circuit reversed the district court and held that an agreement between the Metropolitan School District of Perry Township and Perry Education Association, the teachers' collective bargaining representative, was unconstitutional.⁵⁶ The agreement permitted the Perry Education Association to use the school system's internal mail distribution plan, but prevented the use of the mail plan by the Perry Local Educators' Association, a rival union. In a well-reasoned decision, the circuit court found that the exclusive agreement violated the rival union members' free speech and equal protection rights.⁵⁷ In reaching this conclusion, the court admittedly rejected the trend of recent state and federal cases approving similar exclusive access agreements.⁵⁸ However, lest its decision be construed too broadly, the court carefully qualified the scope of its holding by stressing that it was premised on the discrimination between the members of the separate unions, and not solely on the fact that other, outside organizations were allowed to use the mail system.⁵⁹

The district court had granted summary judgment for the existing union, holding that "the restrictions placed upon the use of facilities

⁵²*Id.* at 1193.

⁵³*Id.* See IND. CODE § 18-4-1-1 (1976) (repealed 1982).

⁵⁴677 F.2d at 1188.

⁵⁵652 F.2d 1286 (7th Cir. 1981) (appeal pending, No. 81-896 (U.S. 1982)).

⁵⁶*Id.* at 1301.

⁵⁷*Id.*

⁵⁸*Id.* at 1289 n.7 (citing among others, Connecticut State Fed'n of Teachers v. Board of Educ. Members, 538 F.2d 471 (2d Cir. 1976); Memphis Am. Fed'n of Teachers Local 2032 v. Board of Educ., 534 F.2d 699 (6th Cir. 1976); Federation of Del. Teachers v. De La Warr Bd. of Educ., 335 F. Supp. 385 (D. Del. 1971); Local 858, American Fed'n of Teachers v. School Dist. No. 1, 314 F. Supp. 1069 (D. Colo. 1970); Geiger v. Duval County School Bd., 357 So. 2d 442 (Fla. Dist. Ct. App. 1978); Clark County Classroom Teachers Ass'n v. Clark County School Dist., 91 Nev. 143, 532 P.2d 1032 (1975) (alternative holding); Maryvale Educators Ass'n v. Newman, 70 A.D.2d 758, 416 N.Y.S.2d 876 (N.Y. 1979)).

⁵⁹652 F.2d at 1301.

not open to the general public . . . [were] ‘so inconsequential that . . . [they] cannot be considered an infringement of the First Amendments rights of free speech’” of the rival union members.⁶⁰ Further, the district court had applied a rational basis level of scrutiny to the equal protection claim and had found that the exclusive access policy was rationally related to the goal of preserving labor peace within the school system.⁶¹

The court of appeals initially noted that, although an exclusive access policy by a private employer would clearly constitute an unfair labor practice under the National Labor Relations Act, the school district was a governmental employer rather than a private employer.⁶² Further, the appellate court noted that the Indiana Education Employment Relations Board, the state agency governing labor relations, had ruled that a school district may, as a matter of state law, grant a majority union the exclusive right to use school communication facilities.⁶³ Nevertheless, although admitting that efficient government operation may justify “reasonably necessary” restrictions on governmental employees’ first amendment rights, the court explicitly held that “the first amendment and equal protection clause apply with full force to the government in its role as employer.”⁶⁴

In considering the first amendment challenge, the court distinguished what it considered to be the two leading cases upholding teacher bargaining units’ exclusive access,⁶⁵ contending that the courts in those cases applied the wrong standard of review.⁶⁶ Succinctly delineating the issue, the *Perry* court stated:

With deference, we suggest that both [courts] erred by confusing the constitutional standards applicable to a rule that evenhandedly excludes all private communications from a particular government facility with the standards applicable to a rule that grants access to certain speakers or certain viewpoints and denies access to others. A challenge by an excluded speaker to the former sort of rule is a claim for absolute

⁶⁰*Id.* at 1289 (quoting Connecticut State Fed’n of Teachers v. Board of Educ. Members, 538 F.2d 471, 481 (2d Cir. 1976)).

⁶¹652 F.2d at 1289.

⁶²*Id.* at 1291.

⁶³*Id.* (citing Pike Indep. Professional Educators, No. U-76-16-5350 (May 20, 1977)).

⁶⁴652 F.2d at 1292. The court noted that previous cases had held the government may not, among other things, “forbid its employees to join a union, compel them to finance political or ideological advocacy by their collective bargaining representative, refuse to permit teachers other than union representatives to speak at open school board meetings” *Id.* (citations omitted).

⁶⁵Connecticut State Fed’n of Teachers v. Board of Educ. Members, 538 F.2d 471 (2d Cir. 1976); Memphis Am. Fed’n of Teachers, Local 2032 v. Board of Educ., 534 F.2d 699 (6th Cir. 1976).

⁶⁶652 F.2d at 1292-93.

access; a challenge to the latter sort is a claim for equal access.⁶⁷

Thus, rather than applying a low level rational basis standard of review, the *Perry* court held that the agreement, permitting differential access to the school communications system, required "rigorous scrutiny."⁶⁸ Further, the high level of review was applicable to both the equal protection and first amendment challenges. Illustrating a comprehension of constitutional principles applicable to differential access cases, the *Perry* court explained that, "The peculiar identity of equal protection and first amendment analysis in differential access cases follows logically from the explicit constitutional designation of speech as fundamental and from the fact that the first amendment's proscription against censorship is itself simply a specialized equal protection guarantee."⁶⁹

The fact that the school district's internal mail system was not a public forum, and therefore not required to be open to any group, did not affect the level of scrutiny. Having opened its forum to one group, the school district could not exclude another group based upon the content of the communications. Content neutrality, the court held, is an "all-pervasive restriction," especially where, as here, the communications were quite near the "very apex of any hierarchy of protected speech."⁷⁰

Having firmly established its commitment to a rigorous standard of review, the *Perry* court rejected the defendant union's attempts to justify its exclusive access. The legal duties argument was disposed of as being both overinclusive and underinclusive and as furthering no discernible state interest.⁷¹ Similarly, because the union had not shown that permitting the rival union equal access to the mail system would interfere with the teaching process, the court refused to accept the defendant union's argument that the access policy preserved labor peace.⁷²

⁶⁷*Id.* at 1293.

⁶⁸*Id.* at 1296.

⁶⁹*Id.*

⁷⁰*Id.* at 1298-99.

⁷¹*Id.* at 1300. The access policy was overinclusive because the agreement did not limit the union's use of the mail system to messages related to its legal duties to members, and underinclusive because the school permitted other outside groups, such as the Y.M.C.A. and scouting organizations, to use the system. *Id.* at 1288, 1300.

⁷²652 F.2d at 1300-01. In November of 1981, an appeal of this case was filed with the Supreme Court of the United States and the case has been docketed. The merits of the case and the question of jurisdiction will be heard at the same time. 42 S. Ct. Bull. (CCH) 656 (Jan. 11, 1982).

C. Fifth Amendment—Self-Incrimination

In *In re Contempt Findings Against Schultz*,⁷³ the Indiana Court of Appeals interpreted Indiana's prior immunity statute⁷⁴ as granting only use, as opposed to transactional, immunity. That statute has since been repealed, and the new one expressly limits the type of immunity a court may grant to use immunity.⁷⁵ Nevertheless, *Schultz* is important because the court found that the grant of use immunity is sufficient to protect the defendant from the perils of self-incrimination.⁷⁶ Therefore, use immunity, whether express or implied, is constitutional.

The facts of this case showed that although the defendant, *Schultz*, had received a fifty-five-year prison sentence for arson and manslaughter, he had implicated another defendant, LaBine, as the person actually responsible for the victim's death. At LaBine's trial, *Schultz* repeatedly invoked his privilege against self-incrimination in response to the State's questions about the event, even though the State had granted *Schultz* immunity. As a result, *Schultz* was found in contempt of court on 27 occasions and given three month consecutive sentences for each offense.

On appeal, *Schultz* argued that his grant of immunity was void because it did not protect him from further prosecution in other jurisdictions, or from prosecution for perjury in Indiana. The appellate court stated that absolute immunity is not a prerequisite to compulsory testimony.⁷⁷ All that is needed to compel a person to testify is a grant of immunity "co-extensive with the scope of [the] privilege" against self-incrimination.⁷⁸

The appellate court discussed the distinction between transactional immunity, which protects a witness against *any* prosecution for offenses to which his testimony relates, and use immunity, which simply prevents the state from using the compelled *testimony* in any respect, but does not prevent future prosecutions.⁷⁹ Recognizing the scope of use immunity, the court concluded that such use immunity leaves the government in the same position as if the witness had refused to testify. The government has the information but cannot use "it or its fruits" against the person; therefore, the immunity is constitutionally sufficient under the fifth amendment.⁸⁰

⁷³428 N.E.2d 1284 (Ind. Ct. App. 1981).

⁷⁴IND. CODE § 35-6-3-1 (1976) (repealed 1981) (now codified at IND. CODE §§ 35-37-3-1 to -3 (1982)).

⁷⁵IND. CODE § 35-37-3-3(a) (1982).

⁷⁶428 N.E.2d at 1288.

⁷⁷*Id.* at 1289.

⁷⁸*Id.* at 1287.

⁷⁹*Id.* Transactional immunity, in effect, operates as a pardon for the offenses disclosed by the testimony.

⁸⁰428 N.E.2d at 1288-89.

In addition to rejecting Schultz's argument that mere use immunity was void, the court rejected his argument that the immunity was void because it failed to protect him from prosecution for perjury.⁸¹ The court held that "the privilege against self-incrimination entitles a witness to keep silent, but does not license him to commit perjury."⁸² The current statute reiterates this conclusion: "A grant of use immunity does not prohibit the use of evidence the witness has given in a prosecution for perjury."⁸³

The court also upheld Schultz's contempt citations,⁸⁴ thus indicating that the current statute, which expressly allows the court to find a witness in contempt if he has been granted immunity but refuses to testify,⁸⁵ is valid. The appellate court did, however, reverse the lower court's finding of 27 separate contempt offenses.⁸⁶ The court held that once the subject matter about which the defendant refuses to testify is defined, the prosecutor may not compound the number of offenses by asking repeated questions about the subject; thus, Schultz was guilty of "one continuing act of contempt."⁸⁷

D. Due Process

1. *Post-trial Contempt Hearing.*—In *Johnson v. State*,⁸⁸ the Indiana Court of Appeals held, for the first time, that due process requires a neutral and detached magistrate to preside over a post-trial contempt hearing, rather than the trial judge who issued the citation. In *Johnson*, the trial court judge, at a post-trial hearing, held a criminal defendant's pauper attorney in direct civil and criminal contempt of court for ignoring an order in limine at trial.⁸⁹

The court of appeals acknowledged that, because of the importance of maintaining the authority and dignity of the court, direct contempt has historically been dealt with summarily.⁹⁰ However, the *Johnson* court, relying upon the United States Supreme Court decision in *Mayberry v. Pennsylvania*,⁹¹ found that, where a *post-trial* hearing is held to determine a contempt citation, the need to protect the

⁸¹*Id.* at 1289.

⁸²*Id.*

⁸³IND. CODE § 35-37-3-3(b) (1982).

⁸⁴428 N.E.2d at 1291.

⁸⁵IND. CODE § 35-37-3-3(c) (1982).

⁸⁶428 N.E.2d at 1291.

⁸⁷*Id.* at 1290-91 (citing *Yates v. United States*, 355 U.S. 66 (1957); *United States v. Yukio Abe*, 95 F. Supp. 991 (D. Hawaii 1964)).

⁸⁸426 N.E.2d 104 (Ind. Ct. App. 1981).

⁸⁹*Id.* at 105-06. The judge first found the attorney to be in civil contempt but later amended his entry to include a finding of criminal contempt as well.

⁹⁰*Id.* at 106.

⁹¹400 U.S. 455 (1971).

orderly administration of justice or the dignity of the court no longer exists.⁹² Therefore, due process requires the hearing to be conducted by a neutral magistrate.⁹³ The court reasoned that justice is better served when there is neither the likelihood nor the appearance of judicial bias against the party accused of contempt.⁹⁴

Although such reasoning can hardly be questioned, the court failed to discuss *Mayberry* and, thus, neglected to note that *Mayberry* contained arguably distinguishable facts. In *Mayberry*, the trial judge was subjected to personal verbal attacks.⁹⁵ However, in *Johnson*, there was no indication that the violation of the trial judge's order was a personal attack on the judge's integrity which would carry any potential for judicial bias. Indeed, in *Mayberry*, the Supreme Court held "that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor."⁹⁶ Thus, in its brief opinion in *Johnson*, the Indiana court neglected to explain its rationale for expanding upon the Supreme Court's decision in *Mayberry*.

2. *Burden of Proof.*—In *Jacks v. Duckworth*,⁹⁷ the Court of Appeals for the Seventh Circuit held that, because jury instructions were to be read as a whole, the trial court's instructions did not violate the defendant's right of due process, even if one instruction appeared to shift the burden of proof.⁹⁸ In reaching its decision, the court of appeals interpreted the recent Supreme Court decision, *Sandstrom v. Montana*.⁹⁹

The plaintiff, Jacks, had been convicted of the first degree murder of his wife and had been sentenced to life in prison, despite a plea of not guilty by reason of insanity. The Indiana Supreme Court, on direct appeal, affirmed the conviction.¹⁰⁰ Jacks then filed a petition for a writ of habeas corpus alleging that he had been denied due process of law because a jury instruction on the element of intent had, in effect, shifted the burden of proof from the state to the defendant.¹⁰¹

Under Indiana law, intent is a necessary element of first degree murder;¹⁰² thus, the state has the burden of its proof. The jury

⁹²426 N.E.2d at 107.

⁹³*Id.*

⁹⁴*Id.*

⁹⁵400 U.S. at 466.

⁹⁶*Id.* (emphasis added).

⁹⁷651 F.2d 480 (7th Cir. 1981), *aff'd* 486 F. Supp. 1366 (N.D. Ind. 1980), *cert. denied*, 102 S. Ct. 1010 (1982).

⁹⁸651 F.2d at 486.

⁹⁹442 U.S. 510 (1979).

¹⁰⁰*Jacks v. State*, 394 N.E.2d 166 (Ind. 1979).

¹⁰¹*Jacks v. Duckworth*, 486 F. Supp. 1366 (N.D. Ind. 1980).

¹⁰²IND. CODE § 35-42-1-1 (1982).

instruction in question told the jury that they could look to surrounding circumstances to determine intent, but "that every one is presumed to intend the natural and probable consequences of his voluntary acts, unless the circumstances are such as to indicate the absence of such intent."¹⁰³ Jacks argued that in *Sandstrom*, the United States Supreme Court had found that a similar jury instruction containing the words "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," created either a burden-shifting presumption or a conclusive presumption of the requisite intent.¹⁰⁴ On that basis, the Court in *Sandstrom* held that the defendant was deprived of his constitutional right to due process.¹⁰⁵

In *Jacks*, the Seventh Circuit noted the *Sandstrom* decision but distinguished it from the instant case because the jury instructions in *Jacks* contained language which nullified the "mandatory injunction to presume the requisite intent from the act committed."¹⁰⁶ In determining intent, the jurors in *Jacks* were told that they could look to all the surrounding circumstances, that there might be "justifying or excusing" facts,¹⁰⁷ and that the circumstances might be "such as to indicate the absence of such intent."¹⁰⁸ Therefore, taken as a whole, the jury instructions did not compel the jury to presume intent and, thus, did not violate Jacks' right to due process.¹⁰⁹

In his dissent, Judge Swygert accused the majority of narrowly construing *Sandstrom*, stating that, except for the final phrase, "unless circumstances are such to indicate the absence of such intent," the disputed instruction in *Jacks* was identical to the *Sandstrom* instruction.¹¹⁰ Swygert argued that the majority had interpreted *Sandstrom* as standing for the proposition that only a jury instruction which creates an irrebuttable presumption of intent is a violation of due process.¹¹¹ By allowing circumstances, in this case insanity, to prove the absence of intent, the instruction in *Jacks* did not create such an irrebuttable presumption. Swygert, however, interpreted *Sandstrom* to mean that a jury instruction would violate due process if it created an irrebuttable presumption of intent or if it shifted the burden of proof of intent to the defendant.¹¹² The instruc-

¹⁰³651 F.2d at 491 (Appendix C, State's Instruction No. 5).

¹⁰⁴442 U.S. at 513, 524. Jacks directed the court's attention to the *Sandstrom* case after his case had been fully briefed to the Indiana Supreme Court. 394 N.E.2d at 175.

¹⁰⁵442 U.S. at 524.

¹⁰⁶651 F.2d at 485-86.

¹⁰⁷*Id.* at 485.

¹⁰⁸*Id.* at 491.

¹⁰⁹*Id.* at 486.

¹¹⁰*Id.* at 491 (Swygert, J., dissenting).

¹¹¹*Id.*

¹¹²*Id.*

tion in Jacks did shift the burden of proof of intent by requiring the defendant to prove circumstances which would rebut the "presumed intent." Therefore, in Judge Swygert's opinion, this shift in the burden of proof was a violation of Jacks' due process rights.¹¹³

3. *Jury Size.*—In *O'Brien v. State*,¹¹⁴ the Indiana Court of Appeals found no constitutional deficiency in an Indiana statutory system which permits a Class D felony case to be tried to a six-member jury in a county court, or to a twelve-member jury in a circuit or superior court.¹¹⁵ A six-member Clark County Court jury convicted O'Brien of possessing more than 30 grams of marijuana, a Class D felony.¹¹⁶ O'Brien's motion for a twelve-member jury had been denied by the trial court. O'Brien appealed his conviction, contending that he had a fundamental constitutional right to a twelve-member jury in a felony case, regardless of the type of court which heard his case.

In 1975, the Indiana General Assembly created the county court system, providing that the county courts would have jurisdiction over minor civil and criminal matters which would be decided by six-member juries.¹¹⁷ The same year, the Indiana Supreme Court held that the six-member jury provision was constitutional.¹¹⁸ In 1979, the jurisdiction of the county courts was extended to include Class D felonies, but the circuit and superior courts also retained jurisdiction over these cases.¹¹⁹ Thus, a person charged with a Class D felony might face a jury with six or twelve members, depending on which forum the prosecutor chose.

In *Williams v. Florida*,¹²⁰ the United States Supreme Court, upholding the constitutionality of six-member juries, stated that the exact number of jury members is irrelevant, provided that the jury is large enough to give the accused a "'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.'"¹²¹ The Court in *Williams* was convinced that there was no evidence of any "discernible difference between the results reached by the two different-sized juries."¹²² Applying *Williams*, the *O'Brien* court held that there was "no constitutional difference between a six-

¹¹³*Id.* at 493.

¹¹⁴422 N.E.2d 1266 (Ind. Ct. App. 1981).

¹¹⁵*Id.* at 1270. See IND. CODE § 35-1-30-1 (Supp. 1981) (repealed 1981) (now codified at IND. CODE § 35-37-1-1 (1982)).

¹¹⁶IND. CODE § 35-1-30-1 (1982).

¹¹⁷Act of May 5, 1975, Pub. L. No. 305, 1975 Ind. Acts 1667, 1697 (now codified at IND. CODE §§ 33-10.5-1-1 to -8-6 (1982)).

¹¹⁸*In re Pub. Law No. 305 and Pub. Law No. 309*, 263 Ind. 506, 334 N.E.2d 659 (1975).

¹¹⁹Act of April 10, 1979, Pub. L. No. 282, 1979 Ind. Acts 1469-70 (now codified at IND. CODE § 33-10.5-3-1(a)(3) (1982)).

¹²⁰399 U.S. 78 (1970).

¹²¹*Id.* at 100 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

¹²²399 U.S. at 101.

member jury and a twelve-member jury so long as each provides the requisite safeguard against overzealous prosecutors and eccentric judges."¹²³

The *O'Brien* court declined to find that a twelve-member jury was a fundamental right because fundamental rights are "those which have their origin in the express terms of the constitution or which are necessarily to be implied from those terms."¹²⁴ Because there is no fundamental right to a twelve-member jury, there need not be a compelling state interest for the choice of jury size but, rather, only a substantial relationship between the classification and the purpose being sought by the legislation.¹²⁵ The court in *O'Brien* found a substantial relationship between the reduced jury size and the legislative interest in promoting a fair and efficient system of justice by providing a speedier, more efficient, and less expensive forum for handling relatively less serious felonies.¹²⁶

4. *Extradition Procedure.*—*McBride v. Soos*,¹²⁷ on remand to the federal district court, contains an interesting discussion of the effect of improper extradition procedures. McBride, alleging violation of his civil rights because certain Missouri extradition statutory procedures were not followed, sued local Indiana police officials.¹²⁸ The constitutional issue was whether McBride had waived his extradition procedural rights. The district court said that there was no written waiver, and that the evidence showed no waiver of any type because "every reasonable presumption should be indulged against finding a waiver of constitutional rights."¹²⁹ However, even though there was no waiver, the court found that the defendants had acted in good faith at all times and, therefore, were not liable for any procedural noncompliance.¹³⁰

The more interesting aspect of the case, however, was the court's finding that McBride *might* be entitled to damages if his procedural extradition rights had been violated, but, absent a showing of injury, he would be entitled only to nominal damages.¹³¹ Apparently McBride was not seeking to have his conviction set aside,¹³² but rather to per-

¹²³422 N.E.2d at 1270.

¹²⁴*Id.* (quoting *Sidle v. Majors*, 264 Ind. 209-10, 341 N.E.2d 763, 766 (1976)) (citing *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

¹²⁵422 N.E.2d at 1270.

¹²⁶*Id.*

¹²⁷512 F. Supp. 1207 (N.D. Ind. 1981).

¹²⁸McBride brought suit under 42 U.S.C. § 1983 (1976), alleging violation of Mo. REV. STAT. §§ 548.101, .141, .151, .171 (1978). 512 F. Supp. at 1209-10.

¹²⁹512 F. Supp. at 1212 (citing *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972)).

¹³⁰512 F. Supp. at 1213.

¹³¹*Id.* at 1213-14. See *Carey v. Piphus*, 435 U.S. 247 (1978).

¹³²It is well settled that noncompliance with the extradition process will not invalidate a subsequent conviction. See *Ker v. Illinois*, 119 U.S. 436 (1886).

suade the court to treat his conviction as a compensable injury. However, the court refused to do so without a showing by McBride that compliance with the extradition procedural protections would have resulted in a different consequence.¹³³

E. Guarantee of Remedy for Injury

In an interesting case, *Seymour National Bank v. State*,¹³⁴ the Indiana Supreme Court held that the term "enforcement of a law"¹³⁵ in the Indiana Tort Claims Act,¹³⁶ which grants immunity from tort liability to a governmental entity or its employees if the loss complained of results from enforcement of a law, is not ambiguous;¹³⁷ thus, the lower court's grant of summary judgment for the State was proper.

In November, 1981, the supreme court granted the plaintiff's petition for rehearing and, in reaffirming its interpretation of the Indiana Tort Claims Act,¹³⁸ the supreme court summarily rejected two constitutional challenges to the Tort Claims Act.¹³⁹ On rehearing, the plaintiff contended that the immunity statute violated the Indiana Constitution's guarantee of a remedy for injury suffered. The constitution provides that: "All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law."¹⁴⁰ The supreme court rejected this argument basing its decision on the appellate court decision in *Krueger v. Bailey*,¹⁴¹ which had upheld the Tort Claims Act. The plaintiff also challenged the Tort Claims Act on equal protection grounds, asserting that there was no rational basis for a classification which immunizes government employees, but no other citizens, from liability for damages resulting from the exercise of their right to enforce the law. The court summarily rejected this contention, finding that the equal protection argument was inapplicable because the plaintiff's complaint "was not against a citizen but against the State."¹⁴² Therefore, it appears from *Seymour* that the immunity from tort liability granted in the Tort Claims Act is constitutionally sound.

¹³³512 F. Supp. at 1215-16.

¹³⁴422 N.E.2d 1223 (Ind. 1981). For a full discussion of the procedural history and the immunity question, see Mead, *Torts, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 377, 411 (1983).

¹³⁵See IND. CODE § 34-4-16.5-3(7) (1982).

¹³⁶*Id.* §§ 34-4-16.5-1 to -19 (1982).

¹³⁷422 N.E.2d at 1226.

¹³⁸*Seymour Nat'l Bank v. State*, 428 N.E.2d 203 (Ind. 1981).

¹³⁹*Id.* at 205.

¹⁴⁰*Id.* (quoting IND. CONST. art. I, § 12).

¹⁴¹406 N.E.2d 665, 670 (Ind. Ct. App. 1980).

¹⁴²428 N.E.2d at 205.

VI. Criminal Law and Procedure

STEPHEN J. JOHNSON*

Although it is commonly said that the law is a jealous mistress, she has been especially demanding of criminal law practitioners in the past ten years. In addition to the enormous amount of precedent created by the United States Supreme Court and by Indiana appellate courts during that period of time, the Indiana legislature has enacted a number of major code sections that directly affect the practice of criminal law. In 1973, the Indiana legislature passed a new code of criminal procedure.¹ In 1977, a new penal code that redefined all the major crimes in Indiana became effective.² In 1979, a new juvenile code became law.³ In 1981, the majority of traffic offenses were decriminalized and the procedures for enforcing violations of traffic laws were "civilized."⁴ This year, the legislature has again adopted a new criminal procedure code, the majority of which became effective on September 1, 1982.⁵ Much of this new procedure code is simply a recodification or a renumbering of existing laws, with very few grammatical or technical changes. However, there are substantial changes in criminal procedure in many areas. This Survey Article will review both the legislative and judicial changes that have occurred in the past year, beginning with an analysis of the statutory changes that have been created by the enactment of the new criminal code.⁶

A. Arrest

The article of the new procedure code concerning preliminary proceedings became effective on June 1, 1981.⁷ Generally, the chapters in this article that concern arrest codified existing statutory and common law arrest powers of police officers. The article also codified the

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¹Act of Apr. 23, 1973, Pub. L. No. 325, 1973 Ind. Acts 1750.

²Act of Apr. 12, 1977, Pub. L. No. 340, 1977 Ind. Acts 1533; Act of Feb. 25, 1976, Pub. L. No. 148, 1976 Ind. Acts 718.

³Act of Apr. 11, 1979, Pub. L. No. 276, 1979 Ind. Acts 1379; Act of Mar. 10, 1978, Pub. L. No. 136, 1978 Ind. Acts 1196.

⁴Act of Apr. 29, 1981, Pub. L. No. 108, 1981 Ind. Acts 1108.

⁵Act of Feb. 25, 1982, Pub. L. No. 204, 1982 Ind. Acts 1518; Act of May 5, 1981, Pub. L. No. 298, 1981 Ind. Acts 2314.

⁶Due to page constraints, not all provisions of the new procedure code are discussed in this Survey Article. Several changes, however, did occur in the statutes concerning venue (current version at IND. CODE §§ 35-32-2-1 to -5 (1982)), change of judge (current version at *id.* §§ 35-36-5-1 to -2), change of venue (current version at *id.* §§ 35-36-6-1 to -10), search and seizure (current version at *id.* §§ 35-33-5-1 to -7), and grand juries (current version at *id.* §§ 35-34-2-1 to -12).

⁷Act of May 5, 1981, Pub. L. No. 298, § 2, 1981 Ind. Acts 2314, 2317 (codified at IND. CODE §§ 35-33-1-1 to -11-10 (1982)).

uncertain and vague common law arrest powers of citizens. Additionally, the article makes it clear that an arrest warrant can only be issued after an indictment or information has been filed. If no criminal charge has been filed, a law enforcement officer may not obtain an arrest warrant simply by presenting probable cause to a judge, which would be sufficient to obtain a search warrant. The article includes a new section on the recall of arrest warrants when charges have been dismissed. The article also modifies existing law permitting issuance of a summons in lieu of a warrant, and adds a new section permitting a police officer to issue a summons and promise to appear in misdemeanor cases in lieu of making an arrest. In addition to the arrest chapters in this article of the new procedure code, many other statutes relating to the law of arrest remain in effect in Indiana and should be considered together with the new code. This portion of the Survey Article, therefore, discusses not only what was done by the new procedure code regarding arrest, but also what was not done.

In the new article concerning arrest, the first subsection simply states that "[a] law enforcement officer⁸ may arrest a person when he has a warrant commanding that the person be arrested."⁹ The warrant is directed to the sheriff in the county where the indictment or information is filed,¹⁰ but arrests made pursuant to the warrant can be made by any Indiana law enforcement officer.¹¹ The legislature retained the statute that requires a police officer to inform the arrestee that the officer is acting under the authority of a warrant and to show the warrant.¹²

The next subsection simply codifies the common law principle that a law enforcement officer may make an arrest whenever he has probable cause to believe the person has committed or is attempting to commit a felony.¹³ The term "probable cause" is not defined by the new code, but probable cause is commonly understood to mean facts and circumstances that are within the arresting officer's knowledge and of which he has reasonably trustworthy information that would

⁸The Indiana Code defines the term "law enforcement officer" to include: "(1) a police officer, sheriff, constable, marshal, or prosecuting attorney; (2) a deputy of any of those persons; or (3) an investigator for a prosecuting attorney." IND. CODE § 35-41-1-2 (1982).

⁹IND. CODE § 35-33-1-1(1) (1982) (footnote added). The form of the warrant is set out in *id.* § 35-33-2-2.

¹⁰*Id.* § 35-33-2-2(a)(8).

¹¹IND. CODE § 35-33-2-3 (1982). See also *id.* §§ 10-1-1-10 (state police powers), 14-3-4-9 (powers of conservation officers), 16-6-8.5-1(b)(2) (powers of designated employees of the Board of Pharmacy), 36-2-13-5(4) (sheriffs' powers), 36-5-7-4(5) (powers of town marshals), 36-8-3-6(a) (city police powers).

¹²*Id.* § 35-1-19-2. Cf. *Carlisle v. State*, 162 Ind. App. 396, 319 N.E.2d 651 (1974) (arrest warrant may be shown to arrested person when he arrives at jail).

¹³IND. CODE § 35-33-1-1(2) (1982).

justify a belief, by a man of reasonable caution, that an offense has been or is being committed by the person arrested.¹⁴ As distinguished from a later subsection defining misdemeanor arrest powers, the felony arrest statute makes no "in the presence" of the arresting officer requirement, which is consistent with the common law.¹⁵ The absence of this requirement allows felony arrests to be made upon credible hearsay.¹⁶ Probable cause need not be confined to facts within the knowledge of the arresting officer alone, but also can be determined on the basis of the collective information known to the law enforcement organization as a whole.¹⁷ Therefore, for example, a police officer can make an arrest based only on a police radio communication.¹⁸

Nothing in the new procedure code limits warrantless arrests by requiring that law enforcement officers must obtain an arrest warrant before making an arrest unless they can demonstrate exigent circumstances that would preclude them from doing so. Past Indiana decisions have conflicted over this requirement,¹⁹ but the Indiana Supreme Court, following the lead of the United States Supreme Court,²⁰ has recently held that if the arrest is made in a public place, warrantless arrests need not be accompanied by exigent circumstances.²¹ The new procedure code does not change these principles; however, it should be noted that each police agency has separate statutes conferring warrantless arrest powers upon that agency.²²

¹⁴See *Akins v. State*, 429 N.E.2d 232, 237 (Ind. 1981) (quoting *Pawloski v. State*, 269 Ind. 350, 352-53, 380 N.E.2d 1230, 1232 (1978)); *Lindley v. State*, 426 N.E.2d 398, 401 (Ind. 1981) (citing *Gaddis v. State*, 267 Ind. 100, 104, 368 N.E.2d 244, 247 (1977)); *Taylor v. State*, 406 N.E.2d 247, 249 (Ind. 1980). It is not the police officer's subjective belief in probable cause that is significant but whether the facts known to the officer show probable cause from an objective standpoint. *Grimes v. State*, 412 N.E.2d 75, 77 (Ind. 1980); *Hatcher v. State*, 410 N.E.2d 1187, 1189 (Ind. 1980). Thus, it does not matter that the police officer enunciates the improper legal theory for arrest, as long as probable cause to arrest for some offense exists. *Hatcher v. State*, 410 N.E.2d at 1189.

¹⁵See *Works v. State*, 266 Ind. 250, 362 N.E.2d 144 (1977).

¹⁶See *Holguin v. State*, 256 Ind. 371, 269 N.E.2d 159 (1971).

¹⁷See *Benton v. State*, 401 N.E.2d 697 (Ind. 1980); *Francis v. State*, 161 Ind. App. 371, 316 N.E.2d 416 (1974).

¹⁸See *Benton v. State*, 401 N.E.2d 697, 699 (Ind. 1980); *Francis v. State*, 161 Ind. App. 371, 373, 316 N.E.2d 416, 418 (1974).

¹⁹Compare *Smith v. State*, 397 N.E.2d 959 (Ind. 1979) and *Britt v. State*, 395 N.E.2d 859 (Ind. Ct. App. 1979) with *Gardner v. State*, 388 N.E.2d 513 (Ind. 1979).

²⁰*United States v. Watson*, 423 U.S. 411 (1976).

²¹*Funk v. State*, 427 N.E.2d 1081 (Ind. 1981). However, a warrant will be required, absent exigent circumstances, to enter the private residence of an arrestee to make an arrest. *Payton v. New York*, 445 U.S. 573 (1980), and a search warrant will be required to enter the residence of a third party in order to effect an arrest. *Steagald v. United States*, 451 U.S. 204 (1981).

²²E.g., IND. CODE §§ 10-1-1-10 (state police), 14-3-4-9 (conservation officer), 16-6-8.5-1 (designee of Board of Pharmacy for controlled substances offenses) 36-2-13-5 (sheriff),

The next subsection permits a law enforcement officer to make an arrest if there is probable cause to believe that the person has failed to stop after a vehicular accident involving personal injury or property damage, or that the person has committed the offense of driving under the influence of alcohol.²³ Previously, the arrest powers for these offenses were found in the traffic laws.²⁴ Indeed, certain provisions in the present traffic laws seem to duplicate new arrest provisions enacted by the new procedure code.²⁵ The new procedure code clearly permits a law enforcement officer to arrest a suspect for driving under the influence of alcohol or for leaving the scene of the accident, even if the offense was not committed in the officer's presence.²⁶ Because both offenses are misdemeanors, an arrest could not be made unless the offenses were committed in the presence of the arresting officer were it not for this specific section of the procedure code.²⁷ The arrest procedures for other traffic offenses will be discussed later in this Survey Article.

The next subsection codifies the common law power of a police officer to make an arrest for a misdemeanor committed in his presence.²⁸ This raises the question of when an offense is committed "in the presence" of the arresting officer. Certainly, if an officer observes a crime, it is committed in his presence.²⁹ If an offense is detected by any of the officer's senses, such as hearing or smell, the offense is also generally considered to be committed in the officer's

36-8-3-6 (city police), 36-5-7-4 (town marshal), (1982). See also *id.* §§ 7.1-2-2-9 (Alcoholic Beverage Commission enforcement officers), 8-3-17-2 (railroad police), 8-3-18-3 (railroad conductors), 11-3-3-7 (parole officer), 36-7-20-3 (housing authority police).

²³IND. CODE § 35-33-1-1(3) (1982). There is another statute that concerns arrests for driving under the influence of alcohol. The implied consent law provides that a law enforcement officer must offer a person the opportunity to submit to a chemical test before he can arrest the person for that offense. *Id.* § 9-4-4.5-3(a). Although the failure to offer the chemical test might affect the determination of whether a person could have his license suspended, it would not affect the validity of the arrest. *State v. Hummel*, 173 Ind. App. 170, 363 N.E.2d 227 (1977), *cert. denied*, 436 U.S. 905 (1978).

²⁴See IND. CODE §§ 9-4-1-130, -134 (1976) (amended 1981) (current version at *id.* §§ 9-4-1-40, -54 (1982)).

²⁵Compare *id.* § 9-4-1-134 (1982) with *id.* § 35-33-1-1(3).

²⁶*Id.* § 35-33-1-1(3).

²⁷*Id.* The traffic law, IND. CODE § 9-4-1-134 (1982), permits an arrest for leaving the scene or driving under the influence of alcohol upon "reasonable cause," but only if the offense is coupled with an accident. The new procedure code does not require that there be an accident coupled with driving under the influence of alcohol to permit an arrest, if the offense is outside the presence of the officer. Obviously, leaving the scene of an accident will always be coupled with an accident. *Id.* § 35-33-1-1(3). This author would assume that the more recent procedure code would control.

²⁸*Id.* § 35-33-1-1(4). See generally *Works v. State*, 266 Ind. 250, 362 N.E.2d 144 (1977); *Brooks v. State*, 249 Ind. 291, 231 N.E.2d 816 (1967); *Doering v. State*, 49 Ind. 56 (1874).

²⁹See generally *Lander v. State*, 238 Ind. 680, 154 N.E.2d 507 (1958); *Dailey v. State*, 194 Ind. 683, 144 N.E.2d 523 (1924).

presence.³⁰ If a suspect admits that he committed a crime, the offense may be considered to have been committed in the presence of the arresting officer.³¹ Because this statute merely carries forward the common law misdemeanor arrest powers of police, it must be construed in light of the common law.³²

In connection with misdemeanor arrests, the new procedure code was amended in 1982 to provide that a law enforcement officer may issue a summons and promise to appear, in lieu of arresting a person who, in the officer's presence, has committed a misdemeanor, other than a traffic misdemeanor.³³ The decision whether to issue the summons is within the discretion of the arresting officer. The statute also sets out the suggested form for the summons and promise to appear.³⁴ The summons and promise to appear must be filed in the appropriate court and a copy given to the prosecuting attorney.³⁵

As noted above, misdemeanors arising from a traffic offense may not be within the new code's misdemeanor summons procedure. A separate traffic statute provides that a person arrested for a traffic misdemeanor³⁶ must be taken immediately before a court in the county

³⁰See *People v. Goldberg*, 280 N.Y.S.2d 646, 227 N.E.2d 575, *cert. denied*, 390 U.S. 909 (1967) (officer heard, through a door, defendant dial telephone and accept horse wager); *State v. Hines*, 504 P.2d 946 (Ariz. Ct. App. 1973) (alcohol on driver's breath); *Corrao v. State*, 154 Ind. App. 525, 290 N.E.2d 484 (1972) (odor of marijuana); *Mullaney v. State*, 246 A.2d 291 (Md. 1968) (odor of marijuana); *City of Tacoma v. Harris*, 436 P.2d 770 (Wash. 1968) (officer heard breach of peace). See generally 2 W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 23.6(a) (2d ed. 1981); 1 C. THOMPSON, INDIANA CRIMINAL PROCEDURE SOURCEBOOK § 3.4, at 3-7 (1974); Annot., 5 A.L.R.4th 681 (1981); Annot., 27 A.L.R.3d 1446 (1969).

. . .³¹See *Moorehead v. State*, 204 Ind. 307, 183 N.E. 801 (1933); *Drake v. State*, 201 Ind. 235, 165 N.E. 757 (1929).

³²This would include the common law principle that the officer must not be a trespasser when the offense is in his presence. See *People v. Wright*, 242 N.E.2d 180 (Ill. 1968); see also W. RINGEL, *supra* note 30; C. THOMPSON, *supra* note 30.

³³IND. CODE § 35-33-4-1(d) (1982). This statutory provision may reflect the modern trend. See 2 W. LAFAYE, SEARCH AND SEIZURE § 5.1(h), at 256 (1978).

³⁴IND. CODE § 35-33-4-1(e) (1982). A separate form for a summons and promise to appear is established for traffic offenses. *Id.* § 9-4-7-4.

³⁵*Id.* § 35-33-4-1(f) (amending *id.* § 35-33-4-1 (Supp. 1981)).

³⁶Traffic offenses that remain a felony or misdemeanor after last year's "decriminalization" of traffic crimes are: misuse of identification plates and titles in salvage yards, IND. CODE § 9-1-3.6-11 (1982); altering special engine numbers, *id.* § 9-1-3-6; operating motor vehicle without ever having obtained a valid license, *id.* §§ 9-1-4-26.5, -27; possession of fictitious operator's license, revoked or suspended driver's license, lending a license to another, failure to surrender a license when suspended or revoked, giving false information to obtain a license, and selling or possessing false titles, *id.* §§ 9-1-4-47, -53(a); driving while license suspended or revoked, *id.* §§ 9-1-4-52, -53(b); failure to surrender suspended, revoked, cancelled, or current driver's license on demand, *id.* § 9-2-1-10(b); driving without proof of financial responsibility, *id.* § 9-4-1-53.5 (effective Jan. 1, 1983); leaving scene of personal injury accident, *id.* § 9-4-1-40; leaving

where the offense "is alleged to have been committed and that has jurisdiction of the offense and is nearest or most accessible to the place where the arrest is made."³⁷ This traffic statute deals less with the arrest powers of law enforcement officers than with the power to take the person into custody following an arrest. In the event of at least one of six statutorily defined situations, the police officer must take the arrestee before the nearest available judge.³⁸ However, except for the offenses of leaving the scene of an accident, driving under the influence of alcohol, and driving with a suspended or revoked license, a police officer can simply issue a summons and promise to appear. Therefore, arrest procedures for misdemeanants under the new procedure code and under the traffic laws are virtually identical; although in the case of a traffic misdemeanor, a police officer would apparently have the discretion to take someone into custody only if a promise to appear was not signed.

The next subsection concerning arrest is one of the most confusing subsections of the new code and must be construed with other recent changes in the law, especially those changes that occurred last year in the traffic laws. The new arrest subsection states that a person may be arrested when the

person charged with an infraction or ordinance violation refuses to either:

(A) produce a valid operator's license or nondriver identification card; or

(B) give his name and address, in order that he can be summoned to appear.³⁹

According to this subsection, it should be emphasized that a person

scene of property accident, *id.* §§ 9-4-1-41, -127.1; failure to report personal injury accident to local police or sheriff, *id.* §§ 9-4-1-45(a), -127.1; driving while intoxicated, *id.* § 9-4-1-54; reckless driving, *id.* § 9-4-1-56.1. Every other traffic offense has been classified as a Class C infraction. *Id.* §§ 9-1-3-11, 9-4-1-127.1(b).

³⁷*Id.* § 9-4-1-130.1 (1982).

³⁸The Indiana Code provides that the police officer must take the arrestee before the nearest available judge:

- (1) When the person demands an immediate appearance before a court.
- (2) When the person is charged with an offense causing or contributing to an accident resulting in injury or death to any person.
- (3) When the person is charged with . . . [driving under the influence of alcohol].
- (4) When the person is charged with failure to stop in the event of an accident causing death, personal injuries, or damage to property.
- (5) When the person refuses to give his written promise to appear in court.
- (6) When the person is charged with driving while his license is suspended or revoked.

IND. CODE § 9-4-1-130.1 (1982). A non-resident can be released upon furnishing a security deposit. *Id.* § 9-4-1-131.

³⁹IND. CODE § 35-33-1-1(5) (1982) (amending *id.* § 35-33-1-1 (Supp. 1981)).

who has committed an infraction or has violated an ordinance cannot be arrested for that offense alone. Rather, the basis for the arrest is the offense of not providing identifying information so that the person can be summoned into court. Although this basis for the arrest is unclear when the subsection is read alone, the basis is clarified when the arrest subsection is read together with the new procedure enacted for the enforcement of infraction and ordinance violations, which provides that

[a] person who knowingly or intentionally refuses to provide either his:

- (1) name, address, and date of birth; or
- (2) driver's license, if in his possession;

to a law enforcement officer who has stopped the person for an infraction or ordinance violation commits a Class C misdemeanor.⁴⁰

Despite minor discrepancies between these two statutes,⁴¹ they are essentially the same. The ordinance and infraction enforcement statute, however, details the specific crime for which the person is being arrested.

Interpreting the two statutes in light of each other avoids another anomalous result. As discussed previously, a law enforcement officer may make an arrest for a felony based upon probable cause, even if the crime is not committed in his presence, but an officer only may make an arrest for a misdemeanor that is committed in his presence. The infraction and ordinance arrest provision does not require that the offense be committed "in the presence" of a law enforcement officer, but it would be anomalous to give an officer greater arrest powers for infractions and ordinance violations than for misdemeanors. However, if the arrest subsection is properly interpreted, an officer is not arresting a person for an infraction or ordinance violation. Rather, the arrest is made for a Class C misdemeanor that is committed in the officer's presence—the failure to provide identifying information to the officer who is issuing a ticket or summons. Thus,

⁴⁰*Id.* § 34-4-32-3 (1982); *see id.* § 34-4-32-2 (permitting officer to make a brief detention of person where officer has good faith belief that person committed infraction or ordinance violation). *See People v. Clyne*, 189 Colo. 412, 541 P.2d 71 (1975) (defendant's arrest for violation of ordinance unlawful, because municipal code provides that custodial arrest is proper only when person does not furnish sufficient evidence of identity or officer has reasonable grounds to believe that person will disregard promise to appear).

⁴¹Under the arrest statute, the person need only provide his name and address, whereas the enforcement statute requires his date of birth. The arrest statute speaks of a valid operator's license or a nondriver identification card, while the enforcement statute mentions only a driver's license.

it is only as a result of the arrest made for the misdemeanor that was committed "in the presence" of the officer that the officer can issue a ticket or summons for an infraction or ordinance violation that was not committed in his presence.

It is foreseeable that these statutes might be challenged on constitutional grounds. It could be argued that these statutes allow a person to be arrested solely for not providing identifying information to a law enforcement officer who has detained him. In *Lawson v. Kolender*,⁴² a recent decision by the Court of Appeals for the Ninth Circuit that may be reviewed by the United States Supreme Court, a California vagrancy statute that required a person who is stopped by a police officer to provide reliable identification when requested by the officer was struck down as an unconstitutional search and seizure. Under the California loitering statute,⁴³ a police officer could stop a person and could request identification when the officer had a reasonable suspicion of criminal activity, in accordance with the standards set out in *Terry v. Ohio*.⁴⁴ The court in *Lawson* held that statutes that require the production of identification violate the fourth amendment because, as a result of the demand for identification, these "statutes bootstrap the authority to arrest on less than probable cause, and the serious intrusion on personal security outweighs the mere possibility that identification may provide a link leading to arrest."⁴⁵

It is true that the failure to provide identifying information under the Indiana statutes provides a basis for arrest where none existed before that failure. However, the context of the Indiana statutes is fundamentally different from the context of California's vagrancy statute. Under the Indiana statutes, the detained person is not being requested to provide identifying information as part of a criminal investigation into suspicious activity. Instead, the person has already violated either a state statute or the law of a local unit of government. The identifying information is not sought as either a basis to bootstrap a *Terry*-type "stop" into probable cause for arrest or to provide additional information in a criminal investigation. Indeed, the identifying information is sought to insure that the detained person may

⁴²658 F.2d 1362 (9th Cir. 1981), *prob. juris. noted*, 102 S. Ct. 1629 (1982).

⁴³CAL. PENAL CODE § 647(e) (West 1970).

⁴⁴392 U.S. 1, 27 (1968) ("whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger"). Whether a request for identification under these circumstances is an unconstitutional search and seizure was specifically left open by the United States Supreme Court in *Brown v. Texas*, 443 U.S. 47, 53 n.3 (1979) (holding that a person could not be required to furnish identification if not reasonably suspected of any criminal conduct). See also *Michigan v. DeFillippo*, 443 U.S. 31 (1979) (evidence uncovered in a warrantless search, in good faith reliance on an ordinance later found to be unconstitutional, did not have to be suppressed because police had abundant probable cause).

⁴⁵658 F.2d at 1366-67.

not be arrested, but *may* be issued a summons and promise to appear. Therefore, the new arrest statute and infraction and ordinance enforcement statute should not be considered to permit an unconstitutional search or seizure of the person.⁴⁶

The Court of Appeals for the Ninth Circuit also found that the California vagrancy statute was constitutionally defective because it was so vague and indefinite that it encouraged arbitrary and discriminatory enforcement by police officers. The statute granted the police unfettered discretion because it did not provide standards for determining whether a person is engaged in suspicious loitering and failed to specify what forms of identification were sufficient to satisfy the statute. Indiana's arrest and infraction and ordinance enforcement statutes obviously do not suffer from this defect. A police officer is empowered to detain someone and ask for identification under these statutes only when a law has been violated. In addition, the forms of identification that will satisfy the statutes are clearly set out.

Because the California statute was being struck down for other reasons, the Ninth Circuit did not directly decide whether the provision of the statute that requires a detained person to produce identification was violative of the constitutional privilege against self-incrimination.⁴⁷ However, the federal court noted that other courts had struck down similar statutes on the grounds that an individual may not be compelled to identify himself.⁴⁸

A challenge to the Indiana statutes on the ground that they compel a person to incriminate himself by providing identifying information must be assessed in view of the United States Supreme Court's decision in *California v. Byers*.⁴⁹ In *Byers*, a California "hit and run" statute, much like the Indiana statutes,⁵⁰ that requires the person involved in an accident to stop and leave identifying information was challenged on the grounds that it violated the constitutional privilege against self-incrimination. Even though stopping a vehicle after an accident and identifying oneself as the person involved is, arguably, more incriminating than merely giving identifying information to an officer after one has been accused of violating an ordinance by a police officer, a majority of the United States Supreme Court in *Byers* found no constitutional violation.⁵¹ Especially important in the interpretation

⁴⁶Cf. *Gomez v. Turner*, 672 F.2d 134, 144 (D.C. Cir. 1982) (request that pedestrians give identification is not an unconstitutional "seizure").

⁴⁷U.S. CONST. amend. V; IND. CONST. art. 1, § 14.

⁴⁸658 F.2d at 1371; see *People v. DeFillippo*, 262 N.W.2d 921, 924 (Mich. Ct. App. 1977), *rev'd on other grounds*, 443 U.S. 31 (1979).

⁴⁹402 U.S. 424 (1971).

⁵⁰Compare IND. CODE §§ 9-4-1-40(b), -42 (1982) with CAL. VEHICLE CODE § 20002(a)(1) (West 1976).

⁵¹See 402 U.S. 424, 427-34.

of the Indiana statutes is this statement in the majority opinion of *Byers*: "Disclosure of name and address is an essentially neutral act. Whatever the collateral consequences of disclosing name and address, the statutory purpose is to implement the state police power to regulate use of motor vehicles."⁵² Again, it must be emphasized that the new Indiana statutes are not concerned with investigatory questioning after a "stop." It is also significant to note that requiring basic identifying information, even when one is in custody and going through the booking process, is considered to be outside the scope of *Miranda v. Arizona*.⁵³

The final attack that might be made against this particular statutory arrest scheme, especially since the "civilizing" of most traffic offenses,⁵⁴ is that a person should not be subjected to arrest for failing to provide an officer with identifying information that would enable the enforcement of a civil judgment. However, clearly it is within the police power of the state to regulate traffic on public roads.⁵⁵ Also, even though a statutory scheme may be essentially civil in nature, portions of it dealing with arrest may be criminal in character.⁵⁶ Therefore, this statutory scheme is not an unwarranted intrusion of law enforcement officers and criminal procedure into a civil process.

Another section on arrest codifies the common law arrest powers of citizens.⁵⁷ The section provides that a citizen can arrest another person if a felony has been committed in the citizen's presence or if there is probable cause to believe that the person has committed a felony.⁵⁸ The common law in Indiana did not require,⁵⁹ nor does the new statute require, that the felony be committed in the presence of the arresting citizen.⁶⁰ However, there is one important distinction between the felony arrest powers of a law enforcement officer and those of a citizen, both at common law and in the new arrest section.

⁵²*Id.* at 432.

⁵³384 U.S. 436 (1966). For cases that support the textual proposition that no *Miranda* warnings are required before asking to see a license, see *United States v. Chase*, 414 F.2d 780 (9th Cir. 1969); *Pulliam v. State*, 264 Ind. 382, 345 N.E.2d 229 (1976).

⁵⁴Proceedings to enforce an infraction or ordinance violation are conducted in accordance with the Indiana Rules of Trial Procedure, IND. CODE § 34-4-32-1(c)(1) (1982), and are proved by a preponderance of the evidence, *id.* § 34-4-32-1(d). A "judgment" is entered against the defendant for proven violations. *Id.* § 34-4-32-4.

⁵⁵60 C.J.S. *Motor Vehicles* § 14 (1969); 7A AM. JUR. 2d *Automobiles and Highway Traffic* §§ 14, 15 (1980).

⁵⁶See *State ex rel. Beaven v. Marion Juvenile Court*, 243 Ind. 209, 184 N.E.2d 20 (1962).

⁵⁷IND. CODE § 35-33-1-4 (1982).

⁵⁸*Id.* § 35-33-1-4(a)(1) to -4(a)(2).

⁵⁹See, e.g., *Kennedy v. State*, 107 Ind. 144, 6 N.E. 305 (1886); *Doering v. State*, 49 Ind. 56 (1874); *Teagarden v. Graham*, 31 Ind. 422 (1869).

⁶⁰See *Smith v. State*, 258 Ind. 594, 283 N.E.2d 365 (1972).

For an arrest by a law enforcement officer to be valid, the officer need only have probable cause to believe that a felony was committed, but for an arrest by a citizen to be valid, a felony must actually have been committed.⁶¹

The new provisions regarding arrest also state that a private citizen may make an arrest for a misdemeanor committed in his presence.⁶² Although the common law on this point in Indiana is sparse, apparently the right of a citizen to arrest for a misdemeanor did exist.⁶³ However, in addition to the "in the presence" requirement for misdemeanor arrests, the statute places two additional restrictions upon a citizen's arrest powers: the misdemeanor must involve a breach of the peace, and the arrest must be necessary to prevent the continuance of the breach of peace.⁶⁴ There is no crime of "breach of the peace" in Indiana and the legislature did not attempt to further define the term. At common law, the term "breach of the peace" could be regarded as a synonym for crime,⁶⁵ but the legislature certainly did not intend the definition to be this broad. Although either "rioting"⁶⁶ or "disorderly conduct"⁶⁷ clearly would constitute a breach of the peace, the term "breach of the peace" is indefinite beyond those crimes.

As soon as practical after the citizen makes an arrest, he must notify a law enforcement officer and deliver the arrestee to the custody of the officer.⁶⁸ The law enforcement officer may process the arrested person as if the officer had arrested him and is not liable for false arrest or false imprisonment.⁶⁹ After receiving custody of the arrestee, the decision to process the arrested person is apparently within the discretion of the officer; the officer could simply decide to release the arrestee.

The next chapter in this article of the code concerns the issuance of arrest warrants.⁷⁰ No arrest warrant may be issued until either an

⁶¹*Id.*; Knotts v. State, 243 Ind. 501, 187 N.E.2d 571 (1963); Simmons v. Vandyke, 138 Ind. 380, 37 N.E. 973 (1894). Another distinction between a law enforcement officer's arrest powers and those of a private citizen is found in the amount of force that may be used to effect an arrest. See IND. CODE § 35-41-3-3 (1982); Rose v. State, 431 N.E.2d 521 (Ind. Ct. App. 1982).

⁶²IND. CODE § 35-33-1-4(a)(3) (1982).

⁶³See Golibart v. Sullivan, 30 Ind. App. 428, 435, 66 N.E. 188, 191 (1903).

⁶⁴IND. CODE § 35-33-1-4(a)(3) (1982).

⁶⁵See R. PERKINS, CRIMINAL LAW 399 (2d ed. 1969); see also IND. CODE § 35-1-5-13 (1982).

⁶⁶IND. CODE § 35-45-1-2 (1982).

⁶⁷*Id.* § 35-45-1-3; R. PERKINS, *supra* note 65, at 400.

⁶⁸IND. CODE § 35-33-1-4(b) (1982).

⁶⁹*Id.* § 35-33-1-4(c). This statute immunizes only the officer. If the citizen makes an illegal arrest, he may be civilly liable for false arrest, false imprisonment, or assault and battery. See Doering v. State, 49 Ind. 56 (1874); see also Teagarden v. Graham, 31 Ind. 422 (1869).

⁷⁰See IND. CODE §§ 35-33-2-1 to -7 (1982).

indictment or an information has been filed.⁷¹ Furthermore, a law enforcement officer may not obtain an arrest warrant simply by presenting probable cause to a judicial officer, as he can to obtain a search warrant.⁷²

The chapter on arrest warrants also clears up a point of confusion in Indiana criminal procedure. Through inartful wording of the prior Indiana statute,⁷³ it was unclear whether there must be an independent judicial determination of probable cause when a grand jury has returned an indictment. The new code states twice that when an indictment is returned, a court can issue an arrest warrant without a judicial determination of probable cause.⁷⁴ However, a judicial determination of probable cause must be made after the filing of an information.⁷⁵ This is consistent with Indiana case law that holds that the return of an indictment by a grand jury is conclusive evidence of probable cause,⁷⁶ but that a judicial determination of probable cause must be made when a prosecutor's information is filed, if an arrest warrant is issued.⁷⁷

Section 5 of the chapter on arrest warrants⁷⁸ adds a new statutory concept to Indiana criminal procedure. The section provides that when an indictment or information has been dismissed, the court will order the sheriff to make a return on an outstanding arrest warrant or summons that relates to the charge, stating that the indictment or information has been dismissed. In addition, the sheriff must give notice of the dismissal to any law enforcement officer to whom the arrest warrant or summons had been delivered. Although Indiana courts have recognized that the arrest warrant ceases to exist when an indictment or an information has been dismissed,⁷⁹ this new subsection in-

⁷¹*Id.* § 35-33-2-1(c).

⁷²Compare IND. CODE § 35-33-2-1(c) with §§ 35-33-5-1 to -7 (1982). This was a matter of disagreement in the Criminal Law Study Commission. The majority believed that a citizen should not be subjected to an arrest, even if there were probable cause for arrest, if the body with the decision to file criminal charges, the grand jury or the prosecuting attorney, should decide that there was insufficient evidence to proceed to trial or that the case otherwise lacked prosecutive merit. Conversation with Richard P. Good, member of Criminal Law Study Commission (June 25, 1982).

⁷³See IND. CODE § 35-31-1-1(d) (Supp. 1981) (repealed 1982).

⁷⁴*Id.* § 35-33-2-1(a), (c)(1) (1982).

⁷⁵*Id.* § 35-33-2-1(b), (c)(2).

⁷⁶State *ex rel.* French v. Hendricks Superior Court, 252 Ind. 213, 224, 247 N.E.2d 519, 526 (1969).

⁷⁷Kinnaird v. State, 251 Ind. 506, 516, 242 N.E.2d 500, 506 (1968).

⁷⁸IND. CODE § 35-33-2-5 (1982).

⁷⁹See Dearing v. State, 229 Ind. 131, 137, 95 N.E.2d 832, 835 (1951). However, although three members of the Indiana Supreme Court stated in *Dearing* that an arrest warrant expired when the criminal charge upon which it was based was dismissed, the Indiana Court of Appeals interpreted the opinion as holding that an arrest war-

cludes specific directives to the sheriff regarding his duties after the charge is dismissed.

The final statutory change in arrest law to be discussed herein concerns the issuance of a summons by a court in a misdemeanor case. Prior law provided that when an indictment or information was filed in a misdemeanor case, the court could direct the issuance of a summons instead of an arrest warrant "if the court has reasonable ground to believe that the person will appear in response to a summons."⁸⁰ Because a court will ordinarily not possess facts that would enable it to decide whether a person would respond to a summons, the new law permits a court simply to exercise its discretion in issuing either a warrant or a summons.⁸¹

A separate statutory section regarding arrest⁸² gives a judge the power to arrest or to order the arrest of a person whom he has probable cause to believe has committed a crime.⁸³ Another section,⁸⁴ consistent with the coroner's powers established in title 36,⁸⁵ provides that the coroner has the arrest powers of the sheriff if the sheriff is incapacitated or has a conflict of interests, and has no chief deputy who could perform the duties, and that the coroner is authorized to arrest the sheriff under authority of a warrant.

Although not included in the new procedure code, other statutes in the prior code that pertain to the arrest power were retained. Among these are the laws concerning the authority to use force in entering a premises to make an arrest,⁸⁶ the requirement that certain police officers either wear a uniform or drive a marked car when making a traffic arrest,⁸⁷ and the requirement that most police officers in the state receive training at the Law Enforcement Academy within one year from the date of their employment.⁸⁸ Also, a law enforce-

rant expires at the end of the term of the court that issued it. *See Hughes v. State*, 385 N.E.2d 461, 464 (Ind. Ct. App. 1979).

Hughes led to the enactment of Act of April 4, 1977, Pub. L. No. 334, 1977 Ind. Acts 1511, 1512, regarding the nonexpiration of felony arrest warrants and the issuance of "rearrest" warrants for misdemeanors, which is now found in the new procedure code at IND. CODE § 35-33-2-4 (1982).

⁸⁰IND. CODE § 35-1-17-2(b) (1978) (repealed 1981).

⁸¹*Id.* § 35-33-4-1(a) (1982).

⁸²*Id.* § 35-33-1-2.

⁸³*Cf. id.* § 35-1-21-1 (1978) (repealed 1981) (giving judges, coroners, and law enforcement officials the power to arrest any person violating a state statute, without specifying a probable cause requirement); *Cato v. Mayes*, 388 N.E.2d 530 (Ind. 1979) (holding justice of peace is immune from liability for false arrest).

⁸⁴IND. CODE § 35-33-1-3 (1982).

⁸⁵*Id.* §§ 36-2-14-4, -5.

⁸⁶*Id.* §§ 35-1-19-4, -6 to -7. There is a general "knock and announce" requirement absent exigent circumstances. *See Cannon v. State*, 414 N.E.2d 578 (Ind. Ct. App. 1980); *Johnson v. State*, 157 Ind. App. 105, 299 N.E.2d 194 (1973).

⁸⁷IND. CODE § 9-4-8-1 (1982); *see State v. Whitney*, 377 N.E.2d 652 (Ind. Ct. App. 1977).

⁸⁸IND. CODE § 5-2-1-9(b) (1982).

ment officer may take a possible delinquent child into custody if the officer has probable cause to believe the child has committed a delinquent act.⁸⁹ Because a delinquent act could be a felony, a misdemeanor, or a juvenile status offense, the officer could take the child into custody solely upon probable cause, even if the misdemeanor were not committed in his presence.⁹⁰

Therefore, it can be seen that the chapters in the new procedure code concerning arrest, as well as the general law of arrest, are an amalgam of something old and something new. Moreover, the discussion of arrest makes one other important point about the new criminal procedure code in general. All of the law relating to a particular aspect of criminal procedure will not be found in the new procedure code. Not even all statutes relating to that subject will be found there. Existing statutes and case law precedent continue to supplement the new procedure code.

B. Initial Hearings

One of the most significant developments of the new code is the chapter on initial hearings.⁹¹ Many of the series of older statutes dealing with the production of an accused before a magistrate after a warrantless arrest, preliminary hearings, and preliminary charge procedures have been eliminated.⁹² Also missing from the new code is the phase in criminal procedure known as arraignment.⁹³ Historically, arraignment was considered a two-step procedure. The defendant was first informed of the charges against him by a reading of the indictment or information and then he was required to plead to the charges.⁹⁴ Now the defendant will be advised of the charges against him at an initial hearing and, at the same time, an automatic plea of not guilty will be entered for the defendant. The plea will become a formal plea of not guilty after the passage of specified periods of time.⁹⁵ In essence, the chapter on initial hearings in the new code⁹⁶

⁸⁹*Id.* § 31-6-4-4(b).

⁹⁰The term "delinquent act" is defined at IND. CODE § 31-6-4-1(a) (1982), and includes acts that would be "offenses" if committed by an adult. An "offense" is defined as either a felony or a misdemeanor. *Id.* § 35-41-1-2. Thus, the authority of a law enforcement officer to take a child into custody is broader than the authority to arrest an adult for a misdemeanor. See IND. CODE ANN. § 31-6-4-4 commentary (West 1979).

⁹¹Act of May 5, 1981, Pub. L. No. 298, § 2, 1981 Ind. Acts 2326-28 (codified at IND. CODE §§ 35-33-7-1 to -7 (1982)).

⁹²IND. CODE §§ 35-1-7-1, -8-1, 35-4-1-1 (Supp. 1981) (repealed 1982).

⁹³See *id.* § 35-4.1-1-1 (1976) (repealed 1982).

⁹⁴See *id.*; see also Andrews v. State, 196 Ind. 12, 146 N.E. 817 (1925).

⁹⁵IND. CODE § 35-33-7-5(7) (1982). This is similar to prior law, where a plea of not guilty was entered if a defendant stood mute or refused to plead. See *id.* § 35-4.1-1-1(d) (1976) (repealed 1982).

⁹⁶*Id.* §§ 35-33-7-1 to -7 (1982). See *id.* §§ 35-1-7-1, 35-1-8-1, 35-4-1-1.

serves the same function as that of the prior law on preliminary hearings, preliminary charges, and arraignments.

The initial hearing procedures are triggered by the arrest of a person, with or without a warrant; however, the procedures will differ depending upon whether the arrest was made pursuant to a warrant. In addition, a person who is issued a summons to appear, in lieu of an arrest,⁹⁷ is apparently entitled to an initial hearing because the summons directs the person to appear before a court at a stated time and place.⁹⁸ However, the initial hearing procedures applicable to a summons are unclear. The initial hearing chapter provides that if a person is "arrested or summoned to appear" before a formal charge is filed, the charge must be prepared at or before the initial hearing.⁹⁹ However, the time periods in the initial hearing chapter are geared to arrest and detention, or to arrest and release on bail. A summons to appear is neither of those. Therefore, it is quite possible that a person who is summoned to appear need not have an initial appearance before the court within the time periods that the statute otherwise provides for initial hearings.

The chapter on initial hearings provides that a person who is arrested without a warrant must be taken promptly before a judicial officer in the county where the arrest is made or in any county that is believed to have venue of the offense.¹⁰⁰ The word "promptly" is not defined in the new code and its definition will no doubt vary under the circumstances of the particular case, but existing case law may provide guidelines for a suitable time frame.¹⁰¹ If the suspect is released on bond immediately after arrest, he need not appear before

⁹⁷See IND. CODE § 35-33-4-1 (1982).

⁹⁸*Id.* § 35-33-4-1(d), (e).

⁹⁹*Id.* § 35-33-7-3(a). The statute does not state to what the person is being summoned, but the intent is probably that the summons is to the initial hearing, because that is the first step in the criminal process after arrest or detention.

¹⁰⁰*Id.* § 35-33-7-1.

¹⁰¹For city police, the code provides that a person may not be detained longer than 24 hours except where Sunday intervenes, in which case a person may not be detained longer than 48 hours. IND. CODE § 36-8-3-11 (1982). The United States District Court for the Northern District of Indiana relied on a predecessor to this statute, *id.* § 18-1-11-8 (1976) (repealed 1982), to impose a general 24- to 48-hour requirement for the production of an arrestee before a judge after a warrantless arrest. *Dommer v. Hatcher*, 427 F. Supp. 1040 (N.D. Ind. 1977), *rev'd sub nom. Dommer v. Crawford*, 638 F.2d 1031 (7th Cir. 1980). Despite its reversal on federal abstention grounds, *Dommer* remains an excellent analysis of Indiana "initial hearing" law prior to the new procedure code. Also, although IND. CODE § 36-8-3-11 (1982) and *Dommer* might provide appropriate guidelines for the definition of "promptly" in the new procedure code, it is questionable whether it is binding on any police agency other than city police. See *Grooms v. Fervida*, 396 N.E.2d 405 (Ind. Ct. App. 1979). The accused need only be produced before the court during its normal hours for conducting business. See *Hill v. Otte*, 258 Ind. 421, 281 N.E.2d 811 (1972).

the judge for his initial hearing until any time up to twenty calendar days after his arrest.¹⁰² Even when a person is arrested pursuant to an arrest warrant, he must be taken promptly before the court that issued the warrant or before a judicial officer that has jurisdiction over the arrestee, although the initial hearing can be delayed for up to twenty days after the arrest if the arrestee has been released in accordance with the provisions of the arrest warrant.¹⁰³ Thus, there is no difference in the timing of the initial hearing for those arrested with a warrant and those arrested without a warrant. However, as will be explained below, the nature of the hearing before the judicial officer will vary according to whether the arrest was made with a warrant.

If the person has been arrested without a warrant, the judge's first task at the initial hearing will be to determine whether there is probable cause to believe that the person committed a crime.¹⁰⁴ This can be accomplished either at the initial hearing or before the initial hearing.¹⁰⁵ The facts for the warrantless arrest are submitted to the judicial officer in an ex parte affidavit.¹⁰⁶ The facts also can be submitted orally under oath.¹⁰⁷ If the judge decides that probable cause exists, the person will be held to answer in the proper court.¹⁰⁸ However, if the judge decides that probable cause is lacking, or if the prosecuting attorney indicates on the record that no charge will be filed against the person, the judicial officer will order the arrestee released.¹⁰⁹ However, a person who is released later may be charged with and arrested for the same offense.¹¹⁰

If the person is arrested under the authority of a warrant, after an indictment or information has been filed, an initial hearing still must be held.¹¹¹ In addition, the person must be brought before the judge promptly after arrest or within twenty days, if he has been released.¹¹²

¹⁰²IND. CODE § 35-33-7-1 (1982).

¹⁰³*Id.* § 35-33-7-4.

¹⁰⁴*Id.* § 35-33-7-2(a).

¹⁰⁵*Id.*

¹⁰⁶*Id.* There is no constitutional requirement that the probable cause determination be made in an adversarial context. *See Gerstein v. Pugh*, 420 U.S. 103 (1975); *Tinsley v. State*, 164 Ind. App. 683, 330 N.E.2d 399 (1975).

¹⁰⁷IND. CODE § 35-33-7-2(a) (1982). If the facts to prove probable cause are submitted orally under oath, the proceeding will be recorded, but it will only be transcribed upon request of a party or upon a court order. *Id.*

¹⁰⁸*Id.* § 35-33-7-2(b).

¹⁰⁹*Id.*

¹¹⁰*Id.* § 35-33-7-7. This is consistent with present law. *See Denson v. State*, 263 Ind. 315, 330 N.E.2d 734 (1975); *State ex rel. Hale v. Marion County Mun. Court*, 234 Ind. 467, 127 N.E.2d 897 (1955).

¹¹¹IND. CODE § 35-33-7-4 (1982).

¹¹²*Id.*

However, the probable cause determination phase of an initial hearing is not required because the inquiry would be a needless duplication of the probable cause decision. When the prosecutor files a criminal information, a court will make a judicial determination of probable cause before issuing an arrest warrant.¹¹³ When a grand jury returns an indictment, it is conclusive evidence of probable cause;¹¹⁴ therefore, an arrest warrant is issued without a judge's determination of probable cause.¹¹⁵ The absence of a second probable cause determination for an arrest by warrant is completely consistent with Indiana case law, which has held that a preliminary hearing to determine probable cause is not required when an arrest warrant was issued after the filing of an information.¹¹⁶

The criminal charges must be filed at or before the initial hearing, unless the prosecutor informs the court that no charges will be filed, in which case the accused is released.¹¹⁷ When the person is arrested pursuant to a warrant, either the grand jury or the prosecuting attorney has already decided what preliminary charges will be filed. However, when a law enforcement officer makes a warrantless arrest, the prosecuting attorney has not decided what charges should be filed. Thus, for warrantless arrests, the prosecutor may state that more time is needed to evaluate the case, or that the transfer of the case to another court is necessary, and "the court shall recess or continue the initial hearing for up to seventy-two (72) hours, excluding intervening Saturdays, Sundays, and legal holidays."¹¹⁸ This provision anticipates the situation in which there is probable cause to charge a crime, but the case may lack prosecutive merit for some reason. It should be noted, however, that before the initial hearing can be recessed, the court must make the required probable cause determination for warrantless arrests.

At this point in the initial hearing for a warrantless arrest, the procedures for felonies and misdemeanors diverge. In a misdemeanor case, the hearing can be recessed after the probable cause decision. However, in a felony case, the court must advise the accused of his

¹¹³*Id.* § 35-33-2-1(b). See *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Kinnaird v. State*, 251 Ind. 506, 242 N.E.2d 500 (1968). See also *supra* notes 73-77 and accompanying text.

¹¹⁴*Gerstein v. Pugh*, 420 U.S. 103, 117 n.19 (1975); *State ex rel. French v. Hendricks Superior Court*, 252 Ind. 213, 224, 247 N.E.2d 519, 526 (1969).

¹¹⁵See IND. CODE § 35-33-2-1(a) (1982).

¹¹⁶E.g., *Poindexter v. State*, 268 Ind. 167, 374 N.E.2d 509 (1978); *Penn v. State*, 242 Ind. 359, 177 N.E.2d 889 (1961). Also, in *Dommer v. Hatcher*, 427 F. Supp. 1040, 1047 (N.D. Ind. 1977), the probable cause determination at the initial appearance before a judge was deemed unnecessary when the arrest was made pursuant to a warrant issued after the filing of an indictment or information. See also *supra* note 101.

¹¹⁷IND. CODE § 35-33-7-2 (1982).

¹¹⁸*Id.* § 35-33-7-3(b).

right to counsel and other rights before the recess of the hearing.¹¹⁹ When the initial hearing is reconvened after the recess, the alleged misdemeanant will be advised of the same rights to which an alleged felon would be advised before the recess, except that the alleged misdemeanant will be advised that he has ten days, rather than twenty days, after the completion of the initial hearing in which to retain counsel.¹²⁰ If a person is charged with one or more misdemeanors, then misdemeanor procedures will be followed. However, if a person is charged with both a felony and a misdemeanor, felony procedures will prevail.¹²¹ Once the initial hearing in a felony case reconvenes after a recess, the court probably will not need to advise the accused of his rights again, but the statute is not clear on this procedure.

At the initial hearing, the judge will have the filed charges before him, and can advise both accused felons and misdemeanants of the charges against them.¹²² The court will also direct the prosecuting attorney to give the defendant or his attorney a copy of any formal felony charges that are already filed or that are ready to be filed; the prosecuting attorney must give an accused misdemeanant or his attorney a copy of misdemeanor charges only if they request them.¹²³ At this time, the court will advise the defendant that a preliminary plea of not guilty is being entered for him and that the plea will become a formal plea of not guilty within twenty days of the initial hearing in a felony case,¹²⁴ or within ten days in a misdemeanor case.¹²⁵

¹¹⁹*Id.* § 35-33-7-5(c). The court in a felony case must advise the defendant:

(1) that he has a right to retain counsel and if he intends to retain counsel he must do so within:
(A) twenty (20) days if the person is charged with a felony; . . .
after this initial hearing because there are deadlines for filing motions and raising defenses, and if those deadlines are missed, the legal issues and defenses that could have been raised will be waived;
(2) that he has a right to assigned counsel at no expense to him if he is indigent;
(3) that he has a right to a speedy trial;
(4) of the amount and conditions of bail;
(5) of his privilege against self-incrimination.

Id. § 35-33-7-5.

Under prior law the purpose of a preliminary hearing was to "(1) [a]dvise the arrestee of the charges made against him; (2) [a]dvise the arrestee of his constitutional rights; (3) [p]rovide the arrestee with an attorney if arrestee was without funds to hire one; (4) [d]etermine whether there is sufficient evidence that the crime charged has been committed and that the accused committed it." *Nacoff v. State*, 256 Ind. 97, 102, 267 N.E.2d 165, 168 (1971) (citation omitted).

¹²⁰IND. CODE § 35-33-7-5(1)(B) (1982).

¹²¹*Id.*

¹²²*Id.* § 35-33-7-5(6).

¹²³*Id.* § 35-33-7-5.

¹²⁴*Id.* § 35-33-7-5(7)(A).

¹²⁵*Id.* § 35-33-7-5(7)(B).

After consulting with counsel, however, if the defendant wishes to enter a different plea,¹²⁶ he may do so at the initial hearing.¹²⁷

Before the completion of the initial hearing, the judge must determine whether an accused who requests assigned counsel is indigent.¹²⁸ If jurisdiction over an indigent defendant is transferred to another court, the receiving court will assign counsel immediately upon acquiring jurisdiction.¹²⁹ The determination of indigency can be reviewed at any time during the proceedings.¹³⁰

Because the new code's "initial hearing" procedures are really a modification of existing preliminary hearing and arraignment statutes, reference may be made to decisions under prior law to answer questions that might arise under the new code. For example, when an accused appears at his initial hearing, he may often be unaccompanied by counsel, especially after a warrantless arrest. Although one of the purposes of the initial hearing is to advise the accused of his right to counsel and to appoint one if he is indigent, arguably, the defendant should be entitled to appointed counsel at the initial hearing. An expansive reading of *Coleman v. Alabama*¹³¹ might lead to this conclusion, but the determination of probable cause before formal charges have been filed has been held not to be a "critical stage" of criminal

¹²⁶The defendant could plead either guilty or guilty but mentally ill. See IND. CODE §§ 35-35-1-1 to -4 (1982).

¹²⁷*Id.* § 35-33-7-5.

¹²⁸*Id.* § 35-33-7-6. The Indiana Supreme Court has detailed the judicial determination of indigency as follows:

First, it appears clear that the defendant does not have to be totally without means to be entitled to counsel. If he legitimately lacks the financial resources to employ an attorney, without imposing substantial hardship on himself or his family, the court must appoint counsel to defend him.

The determination as to the defendant's indigency is not to be made on a superficial examination of income and ownership of property but must be based on as thorough an examination of the defendant's total financial picture as is practical. The record must show that the determination of ability to pay includes a balancing of assets against liabilities and a consideration of the amount of the defendant's disposable income or other resources reasonably available to him after the payment of his fixed or certain obligations. The fact that the defendant was able to post a bond is not determinative of his nonindigency but is only a factor to be considered.

Moore v. State, 401 N.E.2d 676, 678-79 (Ind. 1980) (citations omitted). See also Mitchell v. State, 417 N.E.2d 364, 368 (Ind. Ct. App. 1981); Bergdorff v. State, 405 N.E.2d 550, 553-54 (Ind. Ct. App. 1980).

¹²⁹IND. CODE § 35-33-7-6 (1982).

¹³⁰*Id.* This would permit a court to require a defendant to hire private counsel if he came into money during his case. However, a court's duty to appoint counsel arises at any stage of the proceedings when the defendant's indigency causes him to be without counsel. Moore v. State, 401 N.E.2d 676, 679 (Ind. 1980).

¹³¹399 U.S. 1 (1970) (holding that counsel should be provided at a preliminary hearing).

proceedings to which the right to counsel attaches.¹³² When the defendant is arrested under authority of a warrant, formal charges will have been filed and, arguably, the defendant would be entitled to counsel at the initial hearing under this circumstance. The Indiana Supreme Court has stated that it is incongruous to require that counsel be appointed to represent the defendant prior to the hearing that is designed to inform the defendant of his right to counsel and, if need be, to appoint counsel for him.¹³³ Moreover, the United States Supreme Court in *Gerstein v. Pugh*¹³⁴ distinguished *Coleman* and held that the right to counsel would not attach at a first appearance or a preliminary hearing before a magistrate when a statutory right to confront and to cross-examine prosecution witnesses at the hearing was not provided and when the purpose of the hearing was not to determine whether charges would be filed.¹³⁵ In the new procedure code, there is no right to confront and to cross-examine witnesses at the initial hearing and the decision to charge has already been made. Therefore, it appears that there should be no constitutional right to appointed counsel at the initial hearing.

Another question that might arise is whether the initial hearing can be waived or continued. It might be questioned why anyone would want to waive a hearing that is designed to advise him of certain rights, to determine probable cause, and possibly to appoint counsel. The reason for waiving is that the "omnibus date," which is a trigger date for setting other motion-filing deadlines,¹³⁶ is set within certain periods of time after the completion of the initial hearing or after the appearance of counsel and cannot be continued.¹³⁷ Therefore, an attorney may seek to delay the setting of an omnibus date by waiving or continuing the initial hearing.

Under prior law, the right to a preliminary hearing could apparently be waived.¹³⁸ However, in the event that an initial hearing is waived, common sense would dictate setting the omnibus date relative to the date of the waiver. The purpose of the omnibus date would be defeated if a defendant were permitted to continue indefinitely an omnibus date by waiving an initial hearing. Whether an initial hearing could be continued is another question. Common practice under

¹³²See *Merry v. State*, 166 Ind. App. 199, 335 N.E.2d 249 (1975); see also *Fender v. Lash*, 261 Ind. 373, 304 N.E.2d 209 (1973).

¹³³*Fulks v. State*, 255 Ind. 81, 85, 262 N.E.2d 651, 653 (1970).

¹³⁴420 U.S. 103 (1975).

¹³⁵*Id.* at 122-23.

¹³⁶IND. CODE § 35-36-8-2 (1982). For a detailed discussion of the statutory provisions regarding the omnibus date, see *infra* notes 147-82 and accompanying text.

¹³⁷IND. CODE § 35-36-8-1 (1982).

¹³⁸See *Grooms v. Fervida*, 396 N.E.2d 405 (Ind. Ct. App. 1979); *Grzesiowski v. State*, 168 Ind. App. 318, 343 N.E.2d 305 (1976).

prior law was for defense attorneys to seek continuances of an arraignment because certain motions had to be made before arraignment and plea, or they would be denied summarily.¹³⁹ Seeking to eliminate this practice by avoiding the necessity for it, the new procedure code ties motions to dismiss a criminal charge to the omnibus date, instead of to the date of arraignment and plea.¹⁴⁰ Moreover, a motion to continue the initial hearing normally would be made by an attorney, and the attorney's entry of an appearance, not the initial hearing, would trigger the setting of the omnibus date.¹⁴¹

Another question is what consequences would occur if the statutory procedures for initial hearings were not followed. A failure to comply with these procedures should not be a jurisdictional bar to subsequent proceedings.¹⁴² Delay in bringing an arrestee before a magistrate will be a factor in determining whether evidence that was obtained during the detention, such as a confession, will be suppressed as the fruit of an illegal detention.¹⁴³ The delay may also result in a civil action for false imprisonment.¹⁴⁴ However, even a "kangaroo" initial hearing will be harmless error if no evidence is obtained as the product of an illegal detention.¹⁴⁵ Furthermore, if a defendant is being illegally detained, his remedy is to seek a writ of habeas corpus.¹⁴⁶

C. *Omnibus Date*

The omnibus date is a relatively new concept in Indiana law,¹⁴⁷ although the statutory authority for setting an "omnibus hearing" date or pre-trial hearing date has existed since 1973.¹⁴⁸ The purpose of the omnibus date is not to provide a date for a hearing but simply to provide a fixed date from which other deadlines in the procedure code are measured.¹⁴⁹ However, the omnibus date is not directly relevant to the setting of a trial date because the date for the trial is deter-

¹³⁹See IND. CODE § 35-3.1-1-4(b) (Supp. 1981) (repealed 1982).

¹⁴⁰See *id.* § 35-34-1-4(b) (1982).

¹⁴¹See *id.* § 35-36-8-1(a).

¹⁴²See *Sisk v. State*, 232 Ind. 214, 110 N.E.2d 627 (1953); *Treadwell v. State*, 152 Ind. App. 289, 283 N.E.2d 397 (1972).

¹⁴³See *Richey v. State*, 426 N.E.2d 389 (Ind. 1981); *Pawloski v. State*, 269 Ind. 350, 380 N.E.2d 1230 (1978).

¹⁴⁴See *Harness v. Steele*, 159 Ind. 286, 64 N.E. 875 (1902); *Grooms v. Fervida*, 396 N.E.2d 405 (Ind. Ct. App. 1979).

¹⁴⁵See *Robinson v. State*, 260 Ind. 517, 297 N.E.2d 409 (1973).

¹⁴⁶See IND. CODE § 34-1-57-1 (1982); *Glispie v. State*, 412 N.E.2d 234 (Ind. 1980).

¹⁴⁷Act of May 5, 1981, Pub. L. No. 298, § 5, 1981 Ind. Acts 2314, 2382 (codified at IND. CODE § 35-36-8-1 (1982)).

¹⁴⁸Act of April 23, 1973, Pub. L. No. 325, § 4, 1973 Ind. Acts 1750, 1794 (repealed 1982). This is now called a pre-trial hearing and is governed by IND. CODE § 35-36-8-3 (1982).

¹⁴⁹IND. CODE § 35-36-8-1(a) (1982).

mined from the completion date of the *initial hearing* in both felony and misdemeanor cases, unless the defendant in a felony case moves for an early trial under Criminal Rule 4(B), or the parties in a misdemeanor case agree on an earlier date.¹⁵⁰

In a felony case, within ten days after the first attorney has entered an appearance for the defendant or within twenty days after the completion of the initial hearing, whichever occurs first, the trial court will set an omnibus date and have his clerk notify all counsel of record of the omnibus date.¹⁵¹ The statute provides:

The omnibus date shall be no earlier than forty-five (45) days, and no later than sixty-five (65) days after the first counsel for the defendant has entered his appearance. If counsel has not entered an appearance on behalf of the defendant, the omnibus date shall be no earlier than fifty-five (55) days, and no later than seventy-five (75) days, after completion of the initial hearing.¹⁵²

This date remains the omnibus date for the felony case until the final disposition of the case, and the trial date is set after the omnibus date but within 140 days after the *initial hearing*,¹⁵³ unless the defendant requests an early trial under Criminal Rule 4(B).¹⁵⁴ In a misdemeanor case, the court will set the omnibus date, which will also be the trial date, at the initial hearing, and the date will be "no earlier than thirty (30) days (unless the defendant and the prosecuting attorney agree to an earlier date), and no later than sixty-five (65) days, after the initial hearing."¹⁵⁵ It should be noted that, as in other parts of the procedure code, felony procedures will be followed if even one felony charge is combined with misdemeanor charges.

This statutory scheme for setting the omnibus date may have the effect of delaying the formal appearance of counsel in felony cases. Two hypotheticals will illustrate this effect. In the first hypothetical, defendant A is arrested and is immediately released on bond. His initial hearing must be held within twenty days.¹⁵⁶ At the initial hear-

¹⁵⁰*Id.* §§ 35-36-8-1, -4.

¹⁵¹*Id.* § 35-36-8-1(a).

¹⁵²*Id.*

¹⁵³*Id.* § 35-36-8-4.

¹⁵⁴See IND. R. CR. P. 4(B). The code provides:

If a defendant . . . requests a trial within seventy (70) calendar days in accordance with Criminal Rule 4 . . . then the court shall immediately set the case for trial on a date that is within seventy (70) days after the date of the request, and the court shall reset the omnibus date if the omnibus date is beyond the trial date.

IND. CODE § 35-36-8-1(b) (1982).

¹⁵⁵IND. CODE § 35-36-8-1(c) (1982).

¹⁵⁶*Id.* §§ 35-33-7-1(2), -4.

ing, he is advised that he has twenty days to retain counsel if he is able to do so.¹⁵⁷ If an attorney has not entered an appearance for the defendant, the court must set the day for determining the omnibus date within twenty days after the initial hearing.¹⁵⁸ If the defendant's attorney enters his appearance on the twentieth day after the initial hearing, the omnibus date will be between forty-five and sixty-five days from the date the appearance was entered.¹⁵⁹ Assuming that the maximum time periods permitted by the new procedure code have been utilized, the omnibus date in this hypothetical will be between eighty-five and one hundred and five days after the defendant's arrest.

In the second hypothetical, defendant *B* is arrested for a felony and is immediately released on bond. His attorney enters an appearance the same day. Now, the time for setting the omnibus date must be within ten days.¹⁶⁰ The court, in the interest of judicial efficiency, probably will set the initial hearing date for the same day on which the omnibus date will be set. Because the omnibus date must be between forty-five days and sixty-five days after the formal appearance of counsel,¹⁶¹ the omnibus date in this hypothetical will be within fifty-five to seventy-five days after the defendant is arrested. These hypotheticals illustrate that a sixty-day difference in the omnibus date is possible, if there is a delayed entry of appearance of counsel. However, the attorney may be unwise to delay entering an appearance solely to gain more time, especially because the trial date for a felony is set relative to the initial hearing, and not the omnibus date.

The importance of the omnibus date is its effect on the timing for filing motions. Under the new procedure code, the "indictment or information may be amended in matters of substance or form" at any time until thirty days before the omnibus date in a felony case and until fifteen days before the omnibus date in a misdemeanor case.¹⁶² Motions to dismiss a criminal charge based on certain statutory grounds for dismissal must be filed twenty days before the omnibus date in a felony case, and ten days before the omnibus date in a misdemeanor case.¹⁶³ Therefore, if a prosecuting attorney waits until thirty days before an omnibus date to amend a charge in a felony case, then

¹⁵⁷*Id.* § 35-33-7-5(1)(A).

¹⁵⁸*Id.* § 35-36-8-1(a)(2).

¹⁵⁹*Id.* § 35-36-8-1(a). Although the trial court may set an omnibus date before the 20 days have elapsed, it may be wise for the trial court to wait until the end of the defendant's 20-day period for retention of counsel before setting the omnibus date.

¹⁶⁰*Id.* § 35-36-8-1(a)(1).

¹⁶¹*Id.* § 35-36-8-1(a).

¹⁶²IND. CODE § 35-34-1-5(b) (1982).

¹⁶³*Id.* § 35-34-1-4(b). Motions to dismiss based on lack of subject matter jurisdiction may be made at any time and certain specified statutory grounds may be made any time before or during trial. *Id.*

the defense counsel will have only ten days in which to file a motion to dismiss before certain statutory grounds for dismissal will be held to be waived. However, the code does state that "the court shall, upon motion by the defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense" when the prosecutor has made an amendment.¹⁶⁴

Although the omnibus date is supposed to be fixed, it is unclear whether this language in the code would permit the trial court to continue the omnibus date, or whether this language is simply meant to permit a continuance of the trial. Similar language, found in prior Indiana statutes,¹⁶⁵ has been considered primarily in the context of a continuance of a trial date. The Indiana Supreme Court has held that it is within the discretion of the trial court to determine whether such a continuance is necessary, and if the amendment is only minor or technical in nature, the trial court can deny the continuance.¹⁶⁶ Following this line of reasoning, it is likely that the omnibus date is intended to remain fixed, but that the trial date may be continued if the amendment to the criminal charge requires additional time to prepare a defense.

Notice of a defendant's intent to offer an insanity defense¹⁶⁷ or notice of an alibi¹⁶⁸ must be filed within twenty days of the omnibus date in a felony case, and within ten days of the omnibus date in a misdemeanor case. The time period for the prosecutor's response to the defendant's alibi notice is relative to the date of the defendant's notice, not to the omnibus date.¹⁶⁹ As under prior law, the defendant may plead an insanity defense at any time before trial "in the interest of justice and upon a showing of good cause."¹⁷⁰ The court can schedule a pre-trial conference on the omnibus date or on any other date before trial.¹⁷¹ Motions for change of judge continue to be governed by Criminal Rule 12 and are not linked to the omnibus date.¹⁷²

The concept of an omnibus date is designed to introduce some certainty and streamlining into Indiana criminal procedure, and to avoid endless continuances of pre-trial procedures. However, a flexi-

¹⁶⁴*Id.* § 35-34-1-5(d).

¹⁶⁵See, e.g., IND. CODE § 35-3.1-1-5(d) (Supp. 1981) (repealed 1982).

¹⁶⁶E.g., *Highsaw v. State*, 269 Ind. 458, 460-61, 381 N.E.2d 470, 471 (1978), *cert. denied*, 442 U.S. 941 (1979); see *Henderson v. State*, 173 Ind. App. 505, 507-08, 364 N.E.2d 175, 177 (1977); *Lemont v. State*, 168 Ind. App. 486, 488, 344 N.E.2d 88, 90 (1976).

¹⁶⁷See IND. CODE § 35-36-2-1 (1982).

¹⁶⁸See *id.* § 35-36-4-1.

¹⁶⁹*Id.* § 35-36-4-2(b).

¹⁷⁰*Id.* § 35-36-2-1.

¹⁷¹*Id.* § 35-36-8-3(a).

¹⁷²*Id.* § 35-36-5-1.

ble omnibus date would be not only desirable, but perhaps necessary, when a prosecuting attorney files a felony charge, dismisses it, and then refiles the same charge or additional charges. In this situation, there is a question whether a new initial hearing date and a new omnibus date will be set. This question will be critical when the time periods of Criminal Rule 4(C) are close at hand.¹⁷³ When the omnibus date is not less than forty-five days after the appearance of counsel or not less than fifty-five days from the initial hearing, then the omnibus date might place the trial date beyond the periods of Criminal Rule 4(C) and might entitle the defendant to a discharge. If the defendant did not object to the omnibus date being beyond the Criminal Rule 4 time limits, he would waive his right to a discharge.¹⁷⁴ However, if the defendant did object, the trial court would be in a quandary.

A trial court faced with this situation should follow the dictates of Criminal Rule 4 and accelerate the omnibus date to comply with Criminal Rule 4. Because Criminal Rule 4 is designed to implement the constitutional right to a speedy trial and is essentially a matter of procedure, the time periods of Criminal Rule 4 should control when a conflict arises between the setting of an omnibus date and the speedy trial provisions of Criminal Rule 4.¹⁷⁵

Finally, the fact that the omnibus date sets the time limits for their withdrawal from the case is of importance to defense attorneys. An attorney for an alleged felon may withdraw at any time up to thirty days before the omnibus date, without giving any reason for the withdrawal.¹⁷⁶ However, the trial court must permit counsel to withdraw at any time in the event that at least one of the following five situations occur:

- (1) he has a conflict of interest in continued representation of the defendant;¹⁷⁷
- (2) other counsel has been retained or assigned to defend the case, substitution of new counsel would not cause any delay

¹⁷³See IND. R. CRIM. P. 4(C); see also State v. Tharp, 406 N.E.2d 1242 (Ind. Ct. App. 1980).

¹⁷⁴See Arch v. State, 269 Ind. 450, 381 N.E.2d 465 (1978).

¹⁷⁵See State *ex rel.* Uzelac v. Lake Criminal Court, 247 Ind. 87, 212 N.E.2d 21 (1965).

¹⁷⁶IND. CODE § 35-36-8-2(a) (1982).

¹⁷⁷*Id.* § 35-36-8-2(b)(1). The most commonly occurring potential conflict of interest facing defense attorneys appears to be the representation of co-defendants by one attorney. See, e.g., Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978); Dean v. State, 433 N.E.2d 1172 (Ind. 1982); Ross v. State, 268 Ind. 608, 377 N.E.2d 634 (1978), *rev'd sub nom.* Ross v. Heyne, 638 F.2d 979 (7th Cir. 1980). However, ethical conflicts that would deny an accused the effective assistance of counsel may arise in other contexts. See, e.g., Wood v. Georgia, 450 U.S. 261 (1981); Cowell v. State, 416 N.E.2d 839 (Ind. 1981); Brown v. State, 385 N.E.2d 1148 (Ind. 1979).

in the proceedings, and the defendant consents to or requests substitution of the new counsel;¹⁷⁸

(3) the attorney-client relationship has deteriorated to a point such that counsel cannot render effective assistance to the defendant;¹⁷⁹

(4) the defendant insists upon representing himself and he understands that the withdrawal of counsel will not be permitted to delay the proceedings;¹⁸⁰ or

(5) there is a manifest necessity requiring that counsel withdraw from the case.¹⁸¹

The new code also provides that the court may not permit defense counsel to withdraw within thirty days of the omnibus date solely for the reason that the attorney's fee has not been paid.¹⁸²

¹⁷⁸IND. CODE § 35-36-8-2(b)(2) (1982). Although the defendant has a constitutional right to the assistance of counsel, his right to a particular attorney is not absolute and unqualified. He must exercise his right to select an attorney at an appropriate stage of the proceedings, and the freedom of choice of counsel may not be manipulated to subvert the orderly procedure of the court or to interfere with the fair administration of justice. Therefore, a trial court, in its discretion, may refuse to replace counsel during or immediately before trial, when that substitution would require the court to grant a continuance. *Vacendak v. State*, 431 N.E.2d 100 (Ind. 1982); *Duncan v. State*, 412 N.E.2d 770 (Ind. 1980); *Morgan v. State*, 397 N.E.2d 299 (Ind. Ct. App. 1979).

¹⁷⁹IND. CODE § 35-36-8-2(b)(3) (1982). Certainly, situations may arise in which there has been a total breakdown in communications between a defendant and his attorney that would render any assistance ineffective by that attorney. However, if a trial court determines that the conflict with the attorney would not unduly affect his representation and the defendant attempts to make a substitution immediately before trial, the court may still deny the substitution. See *Harris v. State*, 427 N.E.2d 658 (Ind. 1981); *Harris v. State*, 416 N.E.2d 902 (Ind. Ct. App. 1981).

¹⁸⁰IND. CODE § 35-36-8-2(b)(4) (1982). The defendant has a constitutional right to represent himself as long as the choice is made knowingly and intelligently. *Faretta v. California*, 422 U.S. 806 (1975). A trial court must take considerable pains to insure that a defendant understands the dangers of self-representation. See *Phillips v. State*, 433 N.E.2d 800 (Ind. Ct. App. 1982); *Nation v. State*, 426 N.E.2d 436 (Ind. Ct. App. 1981). A trial court might appoint the defendant's former counsel as "standby counsel" when the defendant elects to represent himself, see *German v. State*, 268 Ind. 67, 373 N.E.2d 880 (1978), although there is no constitutional right to hybrid representation. See *Lock v. State*, 403 N.E.2d 1360 (Ind. 1980).

¹⁸¹IND. CODE § 35-36-8-2(b)(5) (1982). The term "manifest necessity" is not defined and is probably designed to be vague. It should certainly include situations where the defendant's attorney, or perhaps the attorney's family, is experiencing a serious illness. Cf. *White v. State*, 414 N.E.2d 973 (Ind. Ct. App. 1981) (appellants denied effective assistance of counsel when defense counsel had serious heart trouble before and throughout trial).

¹⁸²IND. CODE § 35-36-8-2(c) (1982). The new procedure code erroneously provides "prior to the waiver date" instead of "prior to the omnibus date." There is no such term as "waiver date" in the new procedure code and the body of this statutory section is obviously tied to the "omnibus date."

D. Indictments and Informations

Most of the changes that the new procedure code has made regarding indictments and informations are only minor technical or language changes; however, there are a few changes of importance.¹⁸³

First, the new code provides that a motion to dismiss a criminal charge must be made no later than twenty days prior to the omnibus date in a felony case, or ten days prior to the omnibus date in a misdemeanor case.¹⁸⁴ A motion that is not made within the statutory time period may be denied summarily if: (1) the charge is defective, that is, the charge does not conform substantially with the statutory form of a charge, the allegations demonstrate that the court is without jurisdiction of the crime, or the statute defining the offense is unconstitutional, (2) there is a misjoinder of defendants or duplicitous allegations, (3) the grand jury proceeding was defective, (4) the facts stated do not state the offense with sufficient certainty, or (5) the facts stated do not constitute an offense.¹⁸⁵ A motion to dismiss that is based on the defendant's alleged immunity, on double jeopardy, on a violation of the statute of limitations, on a denial of a speedy trial, on a lack of jurisdiction, or on "any other ground that is a basis for dismissal as a matter of law" may be made or renewed at any time before or during trial.¹⁸⁶ The absence of subject matter jurisdiction may be raised at any time, including after trial.¹⁸⁷

Under prior law, motions to dismiss that were based upon any of the first five grounds recited above had to be made "prior to arraignment and plea" or the defendant faced summary denial.¹⁸⁸ In practice, this led to the continuances of arraignments and pleas in order to allow for the preparation of motions to dismiss based on those grounds. Now, arraignment is no longer a part of Indiana criminal procedure. Under the new code, the motion to dismiss must be filed twenty days before the omnibus date, which is set in relation to the formal appearance of counsel or the initial hearing.

The procedure code also adds a new ground for a motion to dismiss: "Any other ground that is a basis for dismissal as a matter of law."¹⁸⁹ By its very terms, this provision adds nothing to the law

¹⁸³The provisions of the new procedure code dealing with indictment and information are codified at IND. CODE §§ 35-34-1-1 to -19 (1982) (previously codified at *id.* §§ 35-3.1-1-1 to -18 (Supp. 1981) (repealed 1982)).

¹⁸⁴IND. CODE § 35-34-1-4(b) (1982).

¹⁸⁵*Id.* § 35-34-1-4(a), (b).

¹⁸⁶*Id.*

¹⁸⁷*Id.* § 35-34-1-4(b)(2).

¹⁸⁸See IND. CODE § 35-3.1-1-4(b) (Supp. 1981) (repealed 1982).

¹⁸⁹*Id.* § 35-34-1-4(a)(11) (1982).

because only issues that are already recognized grounds for dismissal are included. The provision is purposely vague, but several generally recognized bases for potential dismissal of charges exist, including enforcement of a plea agreement,¹⁹⁰ selective prosecution,¹⁹¹ prosecutorial "vindictiveness,"¹⁹² and destruction of material evidence.¹⁹³

Another change is that the new code allows an indictment or information to be amended "in matters of substance or form" at any time up to thirty days before the omnibus date in a felony case, or fifteen days before the omnibus date in a misdemeanor case, upon giving notice to the defendant.¹⁹⁴ Prior law provided that an amendment in a matter of substance had to be made before the arraignment.¹⁹⁵

A change of equal, if not greater, significance is the repeal of the code section that stated that an indictment or information could never be amended to change the theories of prosecution or to change the identity of the crime charged, and could not be amended after arraignment to cure a legal insufficiency or a failure to state a crime.¹⁹⁶ In a recent case decided under the prior statute, the Indiana Supreme Court criticized the prior statute and stated that, absent these provisions, a party should be able to amend a charge, even as to theory and identity, when the result will not prejudice the defendant's rights.¹⁹⁷ It appears that under the new code, the trial judge apparently will have the discretion to determine whether an amendment prejudices the rights of the defendant.

¹⁹⁰See *Santobello v. New York*, 404 U.S. 257 (1971); *State v. Groat*, 412 N.E.2d 323 (Ind. Ct. App. 1980).

¹⁹¹See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Smith v. State*, 422 N.E.2d 1179 (Ind. 1981); *Lee v. State*, 397 N.E.2d 1047 (Ind. Ct. App. 1979); *Annot.*, 95 A.L.R.3d 280 (1979); 4 A.L.R.3d 404 (1965).

¹⁹²Compare *Cherry v. State*, 414 N.E.2d 301 (Ind. 1981), *cert. denied*, 453 U.S. 946 (1982) with *Bates v. State*, 426 N.E.2d 404 (Ind. 1981) and *Worthington v. State*, 409 N.E.2d 1261 (Ind. Ct. App. 1980); compare *Blackledge v. Perry*, 417 U.S. 21 (1974) with *United States v. Goodwin*, 102 S. Ct. 2485 (1982).

¹⁹³The negligent or intentional destruction or withholding of material evidence by the police or prosecutor may deny a defendant due process and be reversible error. See *Birkla v. State*, 263 Ind. 37, 42, 323 N.E.2d 645, 648, *cert. denied*, 423 U.S. 853 (1975); *Cox v. State*, 422 N.E.2d 357, 364 (Ind. Ct. App. 1981); *Ortez v. State*, 165 Ind. App. 678, 684, 333 N.E.2d 838, 841 (1975). "The burden of proving materiality is on the defendant unless it is self-evident or unless such a showing is prevented by the destruction of the evidence itself." *Cox v. State*, 422 N.E.2d at 364. However, if the defendant claims that a sloppy police investigation led to suppression of evidence he must be able to point to specific evidence that was lost or destroyed. See *Rowan v. State*, 431 N.E.2d 805, 819 (Ind. 1982). Cf. *Schutz v. State*, 413 N.E.2d 913, 916 (Ind. 1981) ("[t]he defense has ample opportunity to correct any such omission through independent investigations, depositions and cross-examination").

¹⁹⁴IND. CODE § 35-34-1-5(b) (1982).

¹⁹⁵See *id.* § 35-3.1-1-5(b) (Supp. 1981) (repealed 1982).

¹⁹⁶*Id.* § 35-3.1-1-5(e).

¹⁹⁷*Trotter v. State*, 429 N.E.2d 637, 640-41 (Ind. 1981).

Under the new code, amendments of "substance"¹⁹⁸ can be made up to thirty days prior to an omnibus date in a felony case. Immaterial defects or a defect "which does not prejudice the substantial right of the defendant"¹⁹⁹ can be amended at any time and the trial court may permit a continuance to enable the defendant to prepare his defense to this kind of amendment.²⁰⁰ Therefore, it is difficult to see how the defendant could be seriously prejudiced in the preparation of his defense by the amendment of the criminal charges under the new code.

E. Public Trial—Closure

The law concerning public and press access to criminal proceedings has developed rapidly in the courts these past few years.²⁰¹ This year, the Indiana legislature has enacted legislation, which became effective September 1, 1982, that is designed to regulate public access to criminal proceedings.²⁰²

The law declares that criminal proceedings are presumptively open to attendance by the general public.²⁰³ The term "criminal proceeding" is defined to mean the court proceedings in a criminal action that occur after the arrest of an accused and before any appeal is commenced.²⁰⁴ Criminal proceedings do not include jury deliberations, omnibus hearings, except when witnesses are sworn in and their testimony is taken, or "any proceeding in which rights of attendance by the general public are otherwise specifically governed by statute or rules of procedure."²⁰⁵ Because there is a requirement for grand jury secrecy, the public will not have access to grand jury proceedings.²⁰⁶ Juvenile proceedings have their own secrecy provisions and are not generally considered criminal proceedings.²⁰⁷ The public will not have access to discovery depositions²⁰⁸ because they are not

¹⁹⁸"Matters of substance" versus "matters of form" can be confused, sometimes, as changing the "identity of the offense" or "theory of the prosecution." See *Henderson v. State*, 403 N.E.2d 1088 (Ind. 1980); *Evans v. State*, 393 N.E.2d 246 (Ind. Ct. App. 1979).

¹⁹⁹IND. CODE § 35-34-1-5(a)(9) (1982).

²⁰⁰*Id.* § 35-34-1-5(a), (d).

²⁰¹See, e.g., *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *State ex rel. Post-Tribune Publishing Co. v. Porter Superior Court*, 412 N.E.2d 748 (Ind. 1980).

²⁰²Act of Feb. 24, 1982, Pub. L. No. 40, § 1, 1982 Ind. Acts 432 (codified at IND. CODE §§ 5-14-2-1 to -10 (1982)).

²⁰³IND. CODE § 5-14-2-2 (1982).

²⁰⁴*Id.* § 5-14-2-1.

²⁰⁵See *id.*

²⁰⁶*Id.* §§ 35-34-2-4(i), 35-34-2-10.

²⁰⁷See *id.* § 31-6-7-10(b).

²⁰⁸See *id.* § 31-6-7-11.

really court proceedings.²⁰⁹ The public also would not be entitled to be present at the obtaining of a search or arrest warrant, even if the warrant were based on oral testimony, because a criminal proceeding does not arise until after the accused is arrested. However, proceedings such as a bail hearing, an initial hearing, or a suppression hearing would probably fall within the definition of the term "criminal proceeding."

The new statute provides that no court may order the exclusion of the "general public"²¹⁰ from a criminal proceeding, or any part of a criminal proceeding, unless the court first affords the parties and general public a "meaningful opportunity to be heard."²¹¹ Whenever exclusion or closure is sought, the court must set a hearing date sufficiently in advance so that the parties and the general public can prepare their pleadings and evidence and can have an opportunity to file briefs on the proposed exclusion order.²¹² Depending upon when a motion for exclusion is filed, this statutory provision may require a continuance of the trial date so that a hearing on the exclusion motion can be held. Nevertheless, the statute does state that "[t]he time for the hearing date shall not be extended, however, so that it imposes an unreasonable delay under the circumstances of the case."²¹³

F. Crimes

The next sections of this Survey Article will touch briefly on some of the major cases decided by Indiana appellate courts during the survey period. Additionally, new criminal statutes that are relevant to these major cases will be discussed, including some portions of the new procedure code which were not discussed earlier.

Several major decisions were handed down during the past survey period which clarified the definition of certain offenses under the 1977 penal code and discussed some of the basic principles of criminal law. In *Markley v. State*,²¹⁴ the defendant, who was charged with battery as a Class C felony, argued that the State failed to prove that he intentionally or knowingly inflicted serious bodily injury. The battery statute provides that a person who knowingly or intentionally touches another in a rude, insolent, or angry manner commits a battery; a Class C felony is committed if the touching results in serious bodily

²⁰⁹See *United States v. United Shoe Machinery Co.*, 198 F. 870 (D. Mass. 1912).

²¹⁰The term "general public" is defined to mean "any individual or group of individuals, but does not include the parties to the criminal action." IND. CODE § 5-14-2-1 (1982).

²¹¹*Id.* § 5-14-2-3.

²¹²*Id.* § 5-14-2-4.

²¹³*Id.*

²¹⁴421 N.E.2d 20 (Ind. Ct. App. 1981).

injury.²¹⁵ The basic culpability statute in the penal code provides that if a kind of culpability is required for the commission of an offense, that same culpability is required with respect to every material element of the prohibited conduct.²¹⁶ To elevate the battery offense to a Class C felony, the defendant in *Markley* argued that the state must prove that serious bodily injury was intentionally and knowingly inflicted because "serious bodily injury" is an element of the crime. The court of appeals, however, concluded that it need not be shown that the defendant intentionally or knowingly inflicted serious bodily injury.²¹⁷ The court stated that the terms "prohibited conduct" and "element" in the culpability statute are not synonymous. Consequently, the court found that proof of serious bodily injury, if proven beyond a reasonable doubt, enhances the penalty for battery, but no proof of culpability is required with respect to this element.²¹⁸

This decision was reinforced by the fact that the battery statute itself did not require that the result of the battery be intended. It was only the rude, insolent, or angry touching which had to be committed intentionally or knowingly. As many of the crimes in the penal code provide for an enhanced penalty if the crime is committed while armed or if serious bodily injury results from the crime, it is important to remember the decision in *Markley*, which held that the aggravating circumstances need not be committed knowingly, intentionally, or recklessly.²¹⁹

In *Swafford v. State*,²²⁰ the Indiana Supreme Court adopted "brain death" as an additional definition of death in homicide cases. The victim in *Swafford* was shot in the back of the head, with the bullet lodging near the center of the brain, close to the brain stem. Concerned by the bullet's close proximity to the brain stem, the neurological surgeons decided to defer any operation unless the victim's condition deteriorated. The next night, the victim's heartbeat and respiration stopped, his pupils became fixed and dilated, and he turned blue. Resuscitative efforts restored the victim's heartbeat and respiration, and the victim was placed on a mechanical ventilator.

The next day, the neurosurgeons made a preliminary diagnosis that the victim's brain had died. The victim no longer responded to painful external stimuli, and his spontaneous movements had ceased. Two blood flow studies revealed no arterial flow of blood to the brain.

²¹⁵IND. CODE § 35-42-2-1(3) (Supp. 1979) (amended 1981 and currently codified at *id.* § 35-42-2-1(3) (1982)).

²¹⁶*Id.* § 35-41-2-2(d) (1982).

²¹⁷421 N.E.2d at 21.

²¹⁸*Id.*

²¹⁹See also *Carty v. State*, 421 N.E.2d 1151, 1155 (Ind. Ct. App. 1981).

²²⁰421 N.E.2d 596 (Ind. 1981).

Based upon these factors, the neurosurgeons concluded that the victim had suffered irreversible cessation of all brain functions. After consulting with family members, a neurosurgeon formally declared the victim dead. The immediate cause of death listed on the death certificate was "brain death" caused by a gunshot wound to the head. At the time he was formally declared dead, the victim's heartbeat and respiration were being sustained by the mechanical ventilator. However, there was no evidence in the record regarding the withdrawal from the ventilator or the cessation of the victim's heartbeat and respiration.

At trial, the medical experts, including the neurosurgeon who declared the victim's death, defined brain death in terms of certain clinical criteria that have been set forth by a committee at Harvard Medical School.²²¹ The neurosurgeon also testified concerning his two confirmatory blood flow studies. The trial court then instructed the jury that brain death could be considered death for the purposes of the homicide statute.²²²

On appeal, the defendant argued that the evidence was insufficient to prove that the victim had "died" because death is legally defined as the cessation of heartbeat and respiration; the defendant also challenged the trial court's instruction on brain death. The supreme court noted that no Indiana statute or judicial decree had ever defined death. The defendant contended that the only acceptable definition of death was that found in the fourth edition of *Black's Law Dictionary*, which defines death as the stoppage of the circulation of the blood and a cessation of vital functions such as respiration.²²³ The defendant argued that any other definition would constitute a retroactive application of a new statutory construction, violating due process. The supreme court rejected the defendant's position, stating that it

²²¹The court set forth the Harvard criteria as: "(1) a total lack of responsiveness to externally applied stimuli (e.g., pinching) and inner need; (2) no spontaneous muscular movements or respiration; and (3) no reflexes, as measured by a fixed, dilated pupil and lack of ocular, pharyngeal, and muscle-tendon reflexes." 421 N.E.2d at 600. The Harvard Committee also emphasized that a "flat" electroencephalogram reading when conducted at 24-hour intervals would have great confirmatory value. See Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, *A Definition of Irreversible Coma*, 205 J. A.M.A. 337 (1968).

²²²The instruction read to the jury was as follows:

If you find beyond a reasonable doubt that William Robinson had suffered brain death before he was removed from the respirator, then the state has satisfied the essential element of the crime of murder requiring proof beyond a reasonable doubt of the death of the victim. Brain death occurs when, in the opinion of a licensed physician, based on accepted medical standards, there has been a total and irreversible cessation of spontaneous brain functions and further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such functions.

421 N.E.2d at 598 n.1.

²²³See BLACK'S LAW DICTIONARY 488 (4th ed. 1968).

would have had some validity only if the definition in Black's had been derived from common law or from the statutes of England before 1607.²²⁴ The supreme court also noted that the definition of death found in the fifth edition of *Black's Law Dictionary*, which was published prior to the events of this case, included a definition of death based primarily on "brain death."²²⁵

The defendant further argued that, even if brain death is recognized as death by a consensus of the medical community, the legislature, not the court, must be the ones to adopt brain death as a legal definition of death. Though the court encouraged the legislature to adopt a statutory definition of death, the court declared that "we are unable to ignore the advances made in medical science and technology during the last two decades."²²⁶ Accordingly, the court stated:

Lest any confusion result, we recognize the following definition of death for purposes of the law of homicide: An individual who has sustained either (1) *irreversible cessation of circulatory and respiratory functions*, or (2) *irreversible cessation of total brain functions*, is dead. A determination of death must be made in accordance with accepted medical standards.²²⁷

Based upon this definition of death, the court found that the evidence was sufficient to prove that the victim had died. The court also resolved another interesting question that arose in this case. To be responsible for the death of a person, the defendant must inflict injuries which contribute either meditately or immediately to death.²²⁸ There was no evidence regarding the withdrawal of the ventilator in this case; however, the court stated that the performance of the autopsy and the medical opinion that the gunshot wound caused brain death were sufficient to prove that the defendant's actions were the cause of the victim's death.²²⁹

The interpretations of criminal recklessness by the Indiana courts have continued to supply interesting decisions during the survey period.²³⁰ In *Williams v. State*,²³¹ the Indiana Supreme Court, by a three-

²²⁴421 N.E.2d at 598 (citing IND. CODE § 1-1-2-1 (1982)).

²²⁵BLACK'S LAW DICTIONARY 170 (5th ed. 1979).

²²⁶421 N.E.2d at 602.

²²⁷*Id.* (citations omitted) (emphasis in original).

²²⁸*Id.* (citing *Bivans v. State*, 254 Ind. 184, 258 N.E.2d 644 (1970); *Reed v. State*, 387 N.E.2d 82 (Ind. Ct. App. 1979)).

²²⁹421 N.E.2d at 602.

²³⁰See *Hergenrother v. State*, 425 N.E.2d 225 (Ind. Ct. App. 1981) (intentional crossing of center line held sufficient to support conviction for reckless homicide); *Salrin v. State*, 419 N.E.2d 1351 (Ind. Ct. App. 1981) (swerving across the center line twice and driving while intoxicated held sufficient to support conviction for reckless homicide).

²³¹423 N.E.2d 598 (Ind.), *rev'd* 415 N.E.2d 118 (Ind. Ct. App. 1981). For a discussion

two majority, reversed the court of appeals' decision that had convicted the defendant truckdriver of criminal recklessness for striking a bicyclist, based upon evidence of the truckdriver's intoxicated state. Although the supreme court's reversal was based in part upon the admission of a confession that the majority held the State failed to prove was voluntary, the court held that the evidence presented to prove criminal recklessness was insufficient.²³² The majority opinion said that, while evidence of intoxication could be considered in determining recklessness, intoxication alone was insufficient to prove recklessness.²³³

In determining what evidence was sufficient to establish criminal recklessness, the majority in *Williams* relied upon a prior supreme court decision, *DeVaney v. State*.²³⁴ In *DeVaney*, a pre-penal code case, the defendant had been convicted of both reckless homicide and causing the death of another while driving under the influence of intoxicating liquor. At the time of the *DeVaney* case, both the crimes of reckless homicide and causing death while driving under the influence were contained in the same statute.²³⁵ In dismissing the charge for reckless homicide, the supreme court in *DeVaney* found that the evidence showing that the defendant driver crossed the center line of the road and was intoxicated was not sufficient to sustain a conviction of reckless homicide; however, the court allowed the defendant's conviction for causing the death while driving intoxicated to stand.²³⁶ The *DeVaney* court's decision rested upon its interpretation of the statute that contained both of these crimes, noting that if the same evidence would result in a conviction for both crimes, then it would be superfluous for a statute to have two provisions punishing identical conduct in the same way.²³⁷

The dissent in *Williams v. State* disagreed with the majority's reliance on *DeVaney*. Chief Justice Givan, joined by Justice Pivarnik, dissented, stating that the rationale behind the decision in *DeVaney* was that the defendant would have been convicted of two crimes for one offense if the convictions for both reckless homicide and driving under the influence had been sustained.²³⁸ Because *Williams* had been convicted only of criminal recklessness, *DeVaney* was inapplicable to the facts in *Williams*.²³⁹

of the appellate court's decision, see Lidke, *Criminal Law and Procedure, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 159, 173-74 (1982).

²³²423 N.E.2d at 600.

²³³*Id.*

²³⁴259 Ind. 483, 288 N.E.2d 732 (1972).

²³⁵See IND. CODE § 9-4-1-54 (1976) (amended 1978).

²³⁶249 Ind. at 494, 288 N.E.2d at 739.

²³⁷*Id.* at 493, 288 N.E.2d at 738.

²³⁸423 N.E.2d at 600.

²³⁹*Id.*

In addition to the applicability of *DeVaney*, the strict standard set by the majority opinion in the supreme court's decision in *Williams* is questionable. By statute, "a person engages in conduct 'recklessly' if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct."²⁴⁰ Driving while intoxicated may not always meet this statutory requirement, and at lower levels of intoxication, it might be wise to require some evidence in addition to intoxication to show criminal recklessness. However, the blood alcohol level of the driver in *Williams* was .37 percent, and such a high blood alcohol level should meet the statutory definition of recklessness.

In a recent appellate case, the defendant attempted to assert a novel defense to a crime. In *State v. Dively*,²⁴¹ the defendant was charged with breaking and entering into her husband's tavern with the intent to commit the felony of theft. Although the defendant and her husband were separated at the time of the alleged offense, the defendant claimed interspousal immunity from prosecution for the theft. The State proved that the tavern and its contents were the separate property of the husband and that the wife had no interest in that property. The trial court, however, dismissed the charge on grounds of interspousal immunity, and the State appealed.

The court of appeals rejected the common law "unity theory" that a husband and wife could not commit crimes against the property of the other and ruled that interspousal immunity did not bar the defendant's prosecution.²⁴² The court noted the statutory exceptions to the common law unity theory included in the Married Woman's Act,²⁴³ which was enacted to protect the property rights of a married woman. The court then noted case law exceptions to interspousal immunity. The court cited two early arson cases where, in each case, one spouse burned the property of the other spouse and was held to have committed arson.²⁴⁴ The court also cited a larceny case which held that a husband cohabiting with his wife could be found guilty of larceny of her separate property.²⁴⁵ The court in *Dively* stated that the 1977 penal code did not intend to change these principles. Thus, the court refused to hold that, as a matter of law, a person could not commit an offense against the property of his or her spouse.²⁴⁶

²⁴⁰IND. CODE § 35-41-2-2(c) (1982).

²⁴¹431 N.E.2d 540 (Ind. Ct. App. 1982).

²⁴²*Id.* at 543.

²⁴³IND. CODE §§ 31-1-9-1 to -16 (1982).

²⁴⁴See *Jordan v. State*, 142 Ind. 422, 41 N.E. 817 (1895); *Garrett v. State*, 109 Ind. 527, 10 N.E. 570 (1886).

²⁴⁵See *Beasley v. State*, 138 Ind. 552, 38 N.E. 35 (1894).

²⁴⁶431 N.E.2d at 543. Specifically, the court stated that:

We conclude that the mere fact of conjugal status does not preclude a spouse

In *Hill v. State*,²⁴⁷ the Indiana Supreme Court construed the robbery statute. In *Hill*, the defendant robbed a taxicab driver named Williamson. Williamson began chasing the defendant and was joined in the chase by a passer-by, Bartlett. Bartlett grabbed the defendant and wrestled him to the ground. The defendant struck Bartlett on the head with a toy gun, inflicting a small laceration, for which Bartlett did not seek medical attention. The defendant was convicted of robbery as a Class A felony.

The supreme court reversed the Class A felony conviction and remanded the case for sentencing on a Class C charge.²⁴⁸ The court cited the statute which defined a robbery as a Class A felony when "it results in either bodily injury or serious bodily injury to any other person."²⁴⁹ Citing its opinion in *Clay v. State*,²⁵⁰ the court construed this statute to mean that robbery is a Class A felony only when bodily injury is inflicted on the victim of the robbery or when serious bodily injury is inflicted on any other person. Because Bartlett clearly did not suffer serious bodily injury, the supreme court held that Bartlett's injury could not be the basis for a finding of guilt on a Class A charge.²⁵¹

This particular section of the robbery statute was amended this year so that the statute now reads that robbery is a Class A felony if it "results in either bodily injury or serious bodily injury to any person *other than a defendant*".²⁵² If the legislature intended to alleviate the *Hill* problem by the amendment, it did not appear to succeed. Adding the phrase "other than a defendant" does not really change the supreme court's interpretation of the robbery statute in *Hill*.

In *State v. Gillespie*,²⁵³ the Indiana appellate court faced another

as a matter of law from committing an offense, including burglary, against the separate property of his or her spouse. We do not believe that the mere existence of the marriage relationship puts a spouse's separate property beyond the protection of the law and subject to the depredation of the other spouse. We recognize that circumstances may exist in particular cases which, as a matter of fact, will prevent an entry by a spouse into the spouse's separate property from amounting to a burglary because the act may be the result of express or implied permission.

Id.

²⁴⁷424 N.E.2d 999 (Ind. 1981).

²⁴⁸*Id.* at 1000.

²⁴⁹IND. CODE § 35-42-5-1 (1976) (amended 1982). "Bodily injury" is defined as "any impairment of physical condition, including physical pain," and "[s]erious bodily injury" is defined as "bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of a bodily member or organ." *Id.* § 35-41-1-2 (1982).

²⁵⁰416 N.E.2d 842 (Ind. 1981).

²⁵¹424 N.E.2d at 1000.

²⁵²IND. CODE § 35-42-5-1 (1982) (emphasis added).

²⁵³428 N.E.2d 1338 (Ind. Ct. App. 1981).

question that was resolved subsequently by recent legislation. In that case, the defendant was charged with attempted dealing of a controlled substance, heroin. It was stipulated by the parties that the substance delivered was crushed common aspirin, and the defendant filed a motion to dismiss. At the hearing on the motion to dismiss, the defendant presented evidence that he had decided to teach an undercover police officer a lesson; thus, the defendant crushed some aspirin, placed it in a foil packet, and sold it to the undercover officer for \$110. The trial court dismissed the information, relying on the decision of the Court of Appeals for the Fifth Circuit in *United States v. Oviedo*,²⁵⁴ which was decided primarily on the common law defense of impossibility. In *Gillespie*, the court of appeals stated that the Indiana Legislature has expressly rejected this type of impossibility defense.²⁵⁵ Under the relevant statute as it existed at the time, the fact that an uncontrolled substance was delivered, standing alone, would not preclude a charge of attempted delivery.²⁵⁶ Therefore, the court held that the charging information was sufficient to withstand a motion to dismiss, even with the stipulation that the substance was aspirin.²⁵⁷ However, the court of appeals agreed that, if the defendant's mens rea was such that he intended to deliver aspirin, the defendant could not be found guilty of the attempted delivery of heroin. Because the defendant's "intent" was not stipulated, this was properly an issue for the trier of fact.

Subsequent to the decision in *Gillespie*, the Indiana legislature enacted legislation to remedy the gap in the law that was noted by the court in *Gillespie*. The new statutory provision makes it a Class D felony to knowingly or intentionally deliver any substance that one represents to be a controlled substance.²⁵⁸

G. Search and Seizure

Several of the more interesting search and seizure cases in the past year involved the waiver of search and seizure rights by juveniles. In *Williams v. State*,²⁵⁹ the supreme court considered the admissibil-

²⁵⁴525 F.2d 881 (5th Cir. 1976). The Fifth Circuit reversed the conviction in *Oviedo*, where a defendant believed he was delivering heroin but in fact delivered procaine hydrochloride, an uncontrolled substance, because the objective acts performed by the defendant must mark the defendant's conduct as criminal. *But cf. United States v. Quijada*, 588 F.2d 1253 (9th Cir. 1978) (defendant can be convicted of attempted distribution of cocaine even though the substance he offered to sell was a noncontrolled substance).

²⁵⁵428 N.E.2d at 1339 (citing IND. CODE § 35-41-5-1(b) (1982)).

²⁵⁶See IND. CODE § 35-48-4-2 (Supp. 1979) (amended 1981).

²⁵⁷428 N.E.2d at 1340.

²⁵⁸See Act of April 13, 1981, Pub. L. No. 305, § 1, 1981 Ind. Acts 2402 (emphasis added) (codified at IND. CODE § 35-48-4-4.5 (1982)).

²⁵⁹433 N.E.2d 769 (Ind. 1982).

ity of certain evidence that was obtained in a search consented to by the defendant's juvenile half-brother. Although the court found that the juvenile's waiver was invalid and the evidence thus improperly admitted, the court upheld the defendant's conviction of attempted murder.²⁶⁰

In this case, after receiving information of a shooting and the victim's description of the defendant who was wounded in the exchange of gunfire, the police located the defendant at a local hospital. Upon arriving at the hospital, a police officer encountered the defendant's seventeen-year-old half-brother, Billingsley, in the emergency room area. Billingsley, who had driven the defendant to the hospital, was arrested and transported to the police station. In the presence of his father, Billingsley was questioned by the police. Billingsley told the police that Williams said he had shot himself with a handgun and that Williams had asked Billingsley to place the gun under a sofa cushion in the apartment which the two shared. With his father present, Billingsley was informed of his rights as a juvenile, and then Billingsley executed a standard consent to search form. After receiving the consent to search, the police went to the apartment and seized the handgun, which contained four bullets and a spent shell casing.

The Indiana Supreme Court initially determined that Billingsley had authority to consent to the search of the apartment.²⁶¹ The more difficult question for the court was whether Billingsley was afforded an opportunity for a "meaningful consultation" with his father before waiving his rights and giving his consent to the search. This issue was premised on Indiana Code section 31-6-7-3(a)(2)(C) which provides that "any rights guaranteed to the child under the Constitution of the United States, the Constitution of Indiana, or any other law may be waived only: . . . (2) by the child's custodial parent, guardian, custodian or guardian ad litem if: . . . (C) meaningful consultation has occurred between that person and the child."²⁶² This section of the Indiana Juvenile Code imposes the "meaningful consultation" requirement on a juvenile's waiver of any constitutional or statutory right and is designed to codify Indiana case law regarding the waiver of rights by juveniles.²⁶³ However, the juvenile waiver cases, prior to the enactment of the juvenile code in 1979, dealt with the waiver of rights before giving a confession or an incriminating statement.

Relying on cases decided before the enactment of the new juvenile code,²⁶⁴ the court in *Williams* said that the State bears a heavy burden

²⁶⁰*Id.* at 771.

²⁶¹*Id.*

²⁶²IND. CODE § 31-6-7-3(a) (1982).

²⁶³IND. CODE ANN. § 31-6-7-3 commentary at 303 (West 1979).

²⁶⁴See, e.g., *Bluitt v. State*, 269 Ind. 438, 381 N.E.2d 458 (1978).

of proving the requirement of meaningful consultation. The court found that, in this case, the State had failed to meet this heavy burden because there was no evidence that the atmosphere surrounding the questioning of Billingsley was "free of the inherently coercive nature normally present in custodial surroundings."²⁶⁵ Also, there was no evidence that any consultation occurred between Billingsley and his father, or that Billingsley waived the right to a meaningful consultation.²⁶⁶

As a consequence of the court's finding that the waiver was ineffective, the gun and bullets that were found during the unconsented search were improperly admitted into evidence.²⁶⁷ Despite this failure to comply with the juvenile code, the supreme court concluded that, because of the unequivocal identification of Williams by the victim, the error was harmless beyond a reasonable doubt²⁶⁸ under the decision of *Chapman v. California*.²⁶⁹

In addition to the specific holding in *Williams*, there are several interesting aspects to the case. First, Williams was asserting the violation of the juvenile rights of another person to seek the exclusion of evidence from his trial. Second, the Indiana Supreme Court relied on cases decided before the juvenile code was enacted to construe the meaningful consultation requirement in the statute. This reliance is reasonable because the statute is essentially a codification of prior case law. However, the court commented in a footnote that the statutory provision might preempt a prior case law determination that a lack of meaningful consultation or opportunity for such consultation might not render a waiver of rights invalid per se.²⁷⁰ By this admonition, the court suggests that much of the case law concerning juvenile matters developed before the enactment of the juvenile code could be eradicated by the juvenile code.²⁷¹ If this occurred, it would be unfortunate because the court has developed reasonable exceptions to the juvenile waiver requirements. For example, when a suspect tells the police that he is over eighteen years of age and, relying on that representation, the police do not follow juvenile waiver standards, the

²⁶⁵433 N.E.2d at 773.

²⁶⁶A juvenile is permitted by statute to waive the right to meaningful consultation with his parent if the waiver is made in the presence of the parent and is made knowingly and voluntarily. IND. CODE § 31-6-7-3(b) (1982). As the supreme court in *Williams* noted, this engrafted a new provision regarding the waiver of juvenile rights, on the court's decision in *Lewis v. State*, 259 Ind. 431, 288 N.E.2d 138 (1972). 433 N.E.2d at 772.

²⁶⁷433 N.E.2d at 773.

²⁶⁸*Id.*

²⁶⁹386 U.S. 18 (1967).

²⁷⁰See 433 N.E.2d at 772 n.1.

²⁷¹See also IND. CODE ANN. § 31-6-7-3 commentary at 303 (West 1979).

court has held that a confession is still admissible.²⁷² Whether the solidifying of juvenile waiver requirements in a statute will stultify the development of common sense exceptions remains to be seen.

Another juvenile case involving the waiver of rights is *Deckard v. State*.²⁷³ The facts in *Deckard* indicated that a juvenile, Moore, was temporarily residing at the defendant's house trailer. Moore had previously signed a waiver of his fourth amendment rights as a condition of probation after an informal delinquency determination. Moore's mother and his probation officer were present when Moore signed the waiver, but Moore's mother did not sign it. Utilizing Moore's waiver, the police searched the defendant's house trailer and discovered marijuana. The court of appeals held that the waiver was not properly executed under the juvenile code because the mother, though present, did not sign the waiver.²⁷⁴

In *Chambers v. State*,²⁷⁵ the Indiana Supreme Court made an interesting distinction between two earlier Indiana court of appeals' decisions and this case, in which the court upheld the conviction for rape, robbery, and confinement. After the defendant in this case had raped the victim, the defendant had removed the victim's military identification card. Subsequently, the victim received several telephone calls from the defendant. After the police had arrested the defendant,²⁷⁶ they took him to the police station. There the defendant was asked to surrender the contents of his pockets. The police received the defendant's wallet and began to look through it for the victim's military identification card. The police did not find the identification card but did find a piece of paper with the victim's name, telephone number, and address on it. This evidence was admitted at trial.

On appeal, the defendant argued that the search was illegal and relied on two earlier court of appeals' cases, *Bradford v. State*²⁷⁷ and *Johnson v. State*,²⁷⁸ both of which involved the search of women's handbags. However, the Indiana Supreme Court unanimously held that a man's wallet is distinguishable from a lady's handbag.²⁷⁹ The court said that *Bradford* and *Johnson* were more similar to *United States v. Chadwick*,²⁸⁰ because *Chadwick* concerned luggage or other personal

²⁷²See *Stone v. State*, 268 Ind. 672, 377 N.E.2d 1372 (1978).

²⁷³425 N.E.2d 256 (Ind. Ct. App. 1981).

²⁷⁴*Id.* at 257. See IND. CODE § 31-6-7-3(a)(2) (1982). The court also held that the search exceeded the scope of the waiver. 425 N.E.2d at 257.

²⁷⁵422 N.E.2d 1198 (Ind. 1981).

²⁷⁶The identification procedure utilized in this case makes the case worth reading for that reason alone.

²⁷⁷401 N.E.2d 77 (Ind. Ct. App. 1980).

²⁷⁸413 N.E.2d 335 (Ind. Ct. App. 1980).

²⁷⁹422 N.E.2d at 1202.

²⁸⁰433 U.S. 1 (1977).

property “‘not immediately associated with the person of the arrestee.’”²⁸¹ The Indiana Supreme Court was aided in this decision by a seventh circuit case,²⁸² which had made a similar distinction. In other words, the court in *Chambers* concluded that a woman’s handbag was like luggage, requiring a warrant to search it once the luggage had been reduced to the custody of the police, but the search of a man’s wallet can be conducted without a warrant because it is really a search of a part of his person.

The defendant also contended that the search of his wallet was not truly a search incident to arrest because he was not ordered to empty his pockets when he was first arrested. The court held, nonetheless, that the search of the wallet after the defendant had been transported to the police station “does not alter the fact that the search was incident to the arrest.”²⁸³

H. Plea Bargaining—Guilty Pleas

In last year’s Survey,²⁸⁴ there was a discussion of the leading case of *Goldsmith v. Marion County Superior Court*.²⁸⁵ In *Goldsmith*, the Indiana Supreme Court clearly declared that a plea agreement between a prosecuting attorney and a criminal defendant that has been accepted by the trial court is binding.²⁸⁶ Shortly after the supreme court’s decision, the court of appeals handed down a trio of cases that elaborated upon the *Goldsmith* decision.

In *Dolan v. State*,²⁸⁷ the defendant was charged with uttering a forged prescription, while he was on probation for a prior conviction of the same type of offense. The defendant pleaded guilty, and the trial court accepted the parties’ plea agreement that provided for a three-year sentence for the defendant’s previous violation and an additional four-year sentence for the present charge, with the two sentences to be served consecutively. On appeal, one of the arguments raised by the defendant was that the trial court erred in not entering on the record the reasons for increasing the two-year presumptive sentence on the forged prescription charge to the maximum allowable sentence of four years. The defendant contended that the

²⁸¹422 N.E.2d at 1203 (quoting *United States v. Chadwick*, 433 U.S. 1, 15 (1977)).

²⁸²*United States v. Berry*, 560 F.2d 861 (7th Cir. 1977), vacated on other grounds, 571 F.2d 2 (7th Cir.), cert. denied, 439 U.S. 840 (1978).

²⁸³422 N.E.2d at 1203.

²⁸⁴Lidke, *Criminal Law and Procedure, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 159, 163 (1982).

²⁸⁵419 N.E.2d 109 (Ind. 1981).

²⁸⁶*Id.* at 114. The pertinent statutes on plea agreements under present law are IND. CODE §§ 35-35-3-1 to -7 (1982).

²⁸⁷420 N.E.2d 1364 (Ind. Ct. App. 1981).

statute required the trial record to include the aggravating circumstances that precipitated the imposition of the maximum sentence.²⁸⁸

The court of appeals noted that a trial court is required by statute to list "the aggravating and mitigating circumstances" that influence its choice of sentence.²⁸⁹ However, the court found that the trial court must recite its reasons for giving an enhanced sentence above the presumptive sentence only when the court is exercising its discretion in sentencing.²⁹⁰ In *Dolan*, the trial court had the discretion to either accept or reject the plea agreement. Relying on *Goldsmith*, the court in *Dolan* stated that once the trial court had exercised its discretion and accepted the plea agreement, then the court was bound.²⁹¹ Once the trial court was bound to impose the sentence in the plea agreement, the court of appeals in *Dolan* stated that "the only facts and circumstances relevant to the issue of the defendant's sentence are the terms of the agreement."²⁹² Therefore, the court of appeals held that the trial court's failure to state the reasons for imposing the maximum sentence was not error, because the record established that the sentence was imposed pursuant to a binding plea agreement.²⁹³

A case that concerned issues similar to those in *Goldsmith* was *Munger v. State*.²⁹⁴ The defendant pleaded guilty to forgery and was sentenced to eight years of imprisonment as part of a plea agreement accepted by the trial court. On appeal, the defendant urged that the trial court erred in failing to consider whether the defendant was eligible for drug abuse treatment as provided for by statute.²⁹⁵ According to the statute, if the defendant were to be treated as a drug abuser, a trial court must put the drug abuser on probation. Because the trial court in this case had accepted a plea agreement which required the defendant to serve eight years, the court of appeals held that, pursuant to *Goldsmith*, the trial court had no discretion to grant the defendant probation as a drug abuser.²⁹⁶ The court of appeals stressed that this holding should not be read as an emasculation of the drug abuse statutes, as the statutes remain relevant as long as this alternative is considered before a plea agreement is accepted by the court.²⁹⁷ For

²⁸⁸See IND. CODE § 35-4.1-4-3 (1982).

²⁸⁹420 N.E.2d at 1369 (citing IND. CODE § 35-4.1-4-3 (1982)).

²⁹⁰420 N.E.2d at 1369.

²⁹¹*Id.* (citing *Goldsmith v. Marion County Superior Court*, 419 N.E.2d 109 (Ind. 1981)).

²⁹²420 N.E.2d at 1370.

²⁹³*Id.*

²⁹⁴420 N.E.2d 1380 (Ind. Ct. App. 1981).

²⁹⁵See IND. CODE § 16-13-6.1-18 (1982).

²⁹⁶420 N.E.2d at 1383.

²⁹⁷*Id.* The court in *Munger* noted that the plea agreement may contain a "reservation of rights" which would allow the trial court to consider probation under the drug abuse treatment statutes after it accepts the plea agreement. *Id.* at 1383 n.3.

example, if the trial court has reason to believe that the defendant is eligible for drug abuse treatment at the time a plea agreement is submitted to the court, the trial court might defer accepting the plea agreement and its terms, until the defendant has an opportunity to undergo drug abuse treatment.²⁹⁸ However, after accepting a plea agreement that provides for an executed sentence, the court is without authority to grant probation.

The final case of the trilogy is *Walker v. State*.²⁹⁹ The court in *Walker* examined the difference between a binding and a nonbinding plea agreement. The factual context of the *Walker* case was different than that involved in *Goldsmith*, *Dolan*, or *Munger*. In *Walker*, the defendant was attempting to enforce a plea agreement. The prosecuting attorney and the defendant submitted an agreement to the trial court in which the defendant agreed to plead guilty to burglary as a Class C felony. The terms of the agreement explained that the potential range of punishment was from two to eight years of imprisonment, and that “[t]he Prosecutor has agreed not to argue for more than a five (5) year term of imprisonment.”³⁰⁰ The prosecutor did recommend a sentence of five years, but the trial judge rejected the prosecutor’s recommendation and imposed an eight-year sentence. On appeal, the defendant sought specific enforcement of the plea agreement.

The court of appeals rejected the defendant’s contention and held that the plea agreement was nonbinding.³⁰¹ Recognizing the distinction between a binding and nonbinding plea agreement, the court stated that:

Under a “nonbinding” sentence recommendation, the defendant extracts a promise from the prosecutor to advocate the imposition of a particular sentence (or that the prosecutor will remain mute at the sentencing hearing), but the defendant knowingly, voluntarily, and intelligently submits to the agreement with the understanding that the sentence recommendation is “nonbinding” and that he or she is not entitled to withdraw the guilty plea if the trial court rejects the recommended sentence.³⁰²

Although this distinction is not drawn from specific statutory provi-

²⁹⁸See IND. CODE § 16-13-6.1-17 (1982) (allowing trial court to defer prosecution for the substantive offense while the defendant receives drug abuse treatment).

²⁹⁹420 N.E.2d 1374 (Ind. Ct. App. 1981).

³⁰⁰*Id.* at 1376. The court noted that a prosecutor, when bound to recommend a particular sentence, “must advocate that sentence persuasively and unequivocally.” *Id.* at 1375 n.2.

³⁰¹*Id.* at 1379.

³⁰²*Id.* at 1378. The distinction between binding and nonbinding plea agreements has been recognized in most federal courts. See the cases cited at *id.* at 1379.

sions, it is necessary for the rational application of the plea bargain statutes.³⁰³ Furthermore, the court in *Walker* noted that if the supreme court's decision in *Goldsmith* was extended to nonbinding plea agreements, the effect would be to "thwart the intent of the parties and circumvent the plain meaning of the terms of the plea agreement."³⁰⁴

The new procedure code has followed the decisions of *Goldsmith*, *Dolan*, *Munger*, and *Walker*. The plea agreement statute has been transferred to the new code,³⁰⁵ as have the statutes that require advising the defendant of his rights prior to the court's acceptance of a guilty plea.³⁰⁶ Under the previous applicable code sections, before accepting a guilty plea, the defendant was to be advised that the judge was not a party to any agreement between the prosecutor and the defendant and, therefore, was not bound by the agreement.³⁰⁷ The new code provides that the judge must determine whether a written sentence recommendation has been executed by the prosecutor and the defendant, and that if one exists, the judge must advise the defendant that if the court accepts the recommendation, then the court is bound by the terms.³⁰⁸ *Walker* will still be relevant case law under the new code because a judge will only be bound by a "binding" agreement; however, if the agreement is nonbinding, the trial court should probably continue to advise the defendant that the court is not bound by that particular agreement, even though the statute no longer requires such an advisement.

As always, a number of cases decided during the survey period involve the proper advisement of the defendant's rights prior to the court's acceptance of a guilty plea. According to prior law³⁰⁹ and the new procedure code, a defendant must be advised of "the maximum possible sentence and minimum sentence for the crime charged and any possible increased sentence by reason of the fact of a prior conviction or convictions, and any possibility of the imposition of consecutive sentences."³¹⁰

In *Pearson v. State*,³¹¹ the defendant's conviction for escaping was reversed because the trial court, prior to accepting the defendant's guilty plea, failed to advise him that any sentence received for escape

³⁰³420 N.E.2d at 1378.

³⁰⁴*Id.*

³⁰⁵See IND. CODE §§ 35-35-3-1 to -7 (1982).

³⁰⁶See *id.* at §§ 35-35-1-1 to -4.

³⁰⁷*Id.* at § 35-4.1-1-3(e) (1976) (repealed 1981).

³⁰⁸*Id.* at § 35-35-1-2(a)(4) (1982).

³⁰⁹*Id.* at § 35-4.1-1-3(d) (1976) (repealed 1981).

³¹⁰*Id.* at § 35-35-1-2(a)(3) (1982).

³¹¹428 N.E.2d 808 (Ind. Ct. App. 1981).

must be served consecutively to the sentence the defendant was currently serving. Conversely, in *Romine v. State*³¹² the trial court erroneously told the defendant that two sentences were required to be served consecutively. Despite this misinformation, the supreme court affirmed the conviction, because it found that the defendant fully understood the consequences of his plea.³¹³

Proper advice as to sentencing consequences was also the issue in *Ricketts v. State*.³¹⁴ In this decision, the defendant pleaded guilty to a Class D felony. The court of appeals reversed the conviction because the trial court, prior to accepting the defendant's guilty plea, had not advised the defendant of the possible minimum sentence for a Class D felony.³¹⁵ The trial court had advised the defendant that the penalty was two years of imprisonment with a possible enhanced sentence of four years. However, the court of appeals noted that the trial court had not advised the defendant of the possibility of alternative misdemeanor sentencing which exists for a Class D felony.³¹⁶ Thus, the court in *Ricketts* clearly establishes that the courts must strictly comply with the terms of the guilty plea advisement statute.

In another decision, *Nash v. State*,³¹⁷ the court of appeals considered the prosecuting attorney's threat to file habitual criminal charges in order to obtain a guilty plea. It is not unlawful coercion to use the threat of an habitual criminal charge to induce the defendant to plead guilty.³¹⁸ However, as the decision in *Nash* illustrates, there must be a "legitimate basis" for threatening the habitual charge. The defendant in *Nash* was charged with numerous thefts arising out of his involvement with a car theft ring. Eight separate habitual offender counts were appended to eight theft charges. The habitual criminal charges were based on the defendant's 1975 convictions for theft and automobile banditry. The court of appeals first noted that the two prior felonies were not unrelated felony convictions as required by the habitual criminal statute,³¹⁹ because the second felony had not been committed after the defendant had been sentenced for the first felony.³²⁰ Moreover, the conviction for auto banditry was vacated six months before the theft charges in the current case were filed. The court also noted that it was clear from the record that the plea bargain

³¹²431 N.E.2d 780 (Ind. 1982).

³¹³*Id.* at 784.

³¹⁴429 N.E.2d 289 (Ind. Ct. App. 1981).

³¹⁵*Id.* at 290.

³¹⁶*Id.* See IND. CODE § 35-50-2-7 (1982).

³¹⁷429 N.E.2d 666 (Ind. Ct. App. 1981).

³¹⁸See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Holmes v. State*, 398 N.E.2d 1279 (Ind. 1980).

³¹⁹IND. CODE § 35-50-2-8(b) (1982); See *Miller v. State*, 417 N.E.2d 339 (Ind. 1981).

³²⁰429 N.E.2d at 668.

in the case was influenced by the habitual offender allegations, and their dismissal was part of the plea bargain.

Indiana law requires that a trial judge inquire of a defendant who is pleading guilty whether any promises, threats, or force were used to obtain his plea.³²¹ The trial judge in *Nash* did not make this inquiry, and the court of appeals found this omission especially egregious in view of the improper allegations of habitual criminal acts that were originally filed and dismissed.³²² There was no indication that the prosecuting attorney actually knew that the earlier auto banditry conviction had been vacated and the definition of the phrase "prior unrelated felony conviction" in the habitual criminal statute was not clarified by the Indiana Supreme Court until 1981.³²³ Thus, the prosecutor in *Nash* may not have been acting in bad faith. However, in view of *Nash* and an earlier decision of the third district,³²⁴ the prosecutor is required at least to have probable cause to believe that the defendant can be prosecuted as an habitual criminal before employing the threat of habitual criminal charges as a legitimate bargaining leverage to obtain a plea agreement. Although it is possible that the prosecutor in *Nash* may have had probable cause to file the habitual charges, even though certified records of prior convictions should have indicated reversal of the one conviction, the trial court's failure to conduct the proper inquiry doomed the defendant's conviction.

I. Sentencing

Several of the most interesting sentencing decisions in the past year concerned probation. Early in 1981, the court of appeals, in *Barnett v. State*,³²⁵ held that restitution could not be ordered as part of an executed sentence.³²⁶ The court in *Barnett* stated that "[a]lthough restitution is a mitigating factor in imposing a sentence . . . nowhere in the sentencing statutes is a provision made for imposing restitution as part of a sentence to be executed."³²⁷ This decision provoked

³²¹IND. CODE § 35-35-1-3(a) (1982).

³²²429 N.E.2d at 672.

³²³*Miller v. State*, 417 N.E.2d 339 (Ind. 1981). The court stated that to prove a "prior unrelated felony conviction" the State must,

show that the defendant had been previously *twice convicted and twice sentenced* for felonies, that the commission of the second offense was subsequent to his having been sentenced upon the first and that the commission of the principal offense upon which the enhanced punishment is being sought was subsequent to his having been sentenced upon the second conviction.

Id. at 342.

³²⁴*Munger v. State*, 420 N.E.2d 1380 (Ind. Ct. App. 1981).

³²⁵414 N.E.2d 965 (Ind. Ct. App. 1981).

³²⁶*Id.* at 966.

³²⁷*Id.*

some concern that restitution could not be made a condition of probation, despite obvious statutory authorization for it.³²⁸ In *Rife v. State*,³²⁹ the trial judge also had ordered restitution as part of an executed sentence. Relying on *Barnett*, the court of appeals held this was fundamental error.³³⁰ The importance of *Rife*, however, lies in the court's delineation of the alternatives to imposing restitution as part of the executed sentence which are available to the trial judge. The court stated that the trial judge could have fined the defendant and suspended a portion of this fine if restitution were made,³³¹ or the trial judge could have required restitution or reparation as a condition to probation.³³² Thus, the court in *Rife* cleared up any concerns over whether restitution can be made a condition to probation.

Ordering restitution as a condition of probation is one thing; revoking probation for failing to make restitution is another. That was the problem confronting the court of appeals in *Sparkman v. State*.³³³ Sparkman pleaded guilty to check deception, and it was shown that he had passed other bad checks which totaled \$501. The trial court suspended the defendant's six-month sentence on the condition that he make restitution of \$501 in twenty days, and Sparkman agreed. Sparkman failed to make restitution and the State filed a petition for revocation of his probation.

Under the Indiana Code, probation can not be revoked for failure to meet financial obligations imposed as a condition to probation, unless the person "recklessly, knowingly, or intentionally fails to pay."³³⁴ Sparkman had made no attempt to contact the court or the prosecuting attorney concerning his ability to pay. He paid nothing on the obligation, and when the State filed a petition to revoke his probation, he left the state. Although briefly employed in Nevada, he made no effort to make restitution.³³⁵ Consequently, the court of appeals held that the evidence was sufficient to find that Sparkman recklessly, knowingly, and intentionally failed to pay.³³⁶

The special nature of probation revocation proceedings was made evident by two other decisions during the past year. In *Jackson v. State*,³³⁷ the defendant was placed on probation after a burglary conviction. Subsequently, the defendant was charged with committing a

³²⁸See IND. CODE § 35-7-2-1(a)(5) (1982).

³²⁹424 N.E.2d 188 (Ind. Ct. App. 1981).

³³⁰*Id.* at 192.

³³¹For statutory support, see IND. CODE § 35-50-3-1 (1982).

³³²For statutory support, see *id.* § 35-7-2-1(a)(5).

³³³432 N.E.2d 437 (Ind. Ct. App. 1982).

³³⁴IND. CODE § 35-7-2-2(e) (1982).

³³⁵Sparkman had apparently not been otherwise employed since 1978.

³³⁶432 N.E.2d at 440.

³³⁷420 N.E.2d 1239 (Ind. Ct. App. 1981).

crime while on probation, but a jury acquitted him of that offense. Two months later, the defendant's probation was revoked on the basis of the same conduct for which he was acquitted by the jury. The defendant argued that double jeopardy barred the revocation of his probation following an acquittal for the same conduct. The court of appeals acknowledged that this was a case of first impression in Indiana and decided to follow what it labeled as the majority position in the United States which permits a revocation.³³⁸ The court also noted that Indiana Code section 35-7-2-2(d)³³⁹ requires the State to prove a probation violation by a civil preponderance of the evidence, rather than beyond a reasonable doubt.³⁴⁰

In *Shumaker v. State*,³⁴¹ the defendant was found to have violated the conditions of his probation by failing to remain on good behavior and by possessing or using marijuana. Two of the items attached to the petition for revocation were two voluntary statements made by the defendant to his probation officer. The defendant contended on appeal that the statements were erroneously admitted at his revocation hearing because the State failed to establish the *corpus delicti*. The court of appeals stated that, although a person is entitled to certain due process rights at a revocation hearing,³⁴² the hearing is civil in nature with the burden of proof being a preponderance of the evidence.³⁴³ Although an arrest standing alone will not necessarily support revocation of probation, where evidence is sufficient to show that an arrest was reasonable and that there is probable cause to believe that the defendant has violated a criminal law, revocation of probation is proper.³⁴⁴ In this case, documents were submitted showing that warrants had been issued for the defendant's arrest, and the defendant's statements were used to establish probable cause for his arrest. Therefore, the trial court could find that the defendant's arrest was reasonable and that there was probable cause to believe the defendant had violated a criminal law. Consequently, the court of appeals held that probation could be revoked on the basis that the arrest was reasonable, and there was no need to establish *corpus delicti* to admit the statements.³⁴⁵

The "rule of lenity" (or perhaps it should be called the "single

³³⁸*Id.* at 1242.

³³⁹IND. CODE § 35-7-2-2(d) (1982).

³⁴⁰420 N.E.2d at 1242.

³⁴¹431 N.E.2d 862 (Ind. Ct. App. 1982).

³⁴²See *Morrissey v. Brewer*, 408 U.S. 471 (1972).

³⁴³431 N.E.2d at 863 (citing IND. CODE § 35-7-2-2(d) (1982); *Monroe v. State*, 419 N.E.2d 831 (Ind. Ct. App. 1981)).

³⁴⁴431 N.E.2d at 863 (citing *Hoffa v. State*, 267 Ind. 133, 368 N.E.2d 250 (1977)).

³⁴⁵431 N.E.2d at 863. The court of appeals also rejected defendant's argument that the "good behavior" condition of probation was void for vagueness. *Id.* at 864.

larceny" theory) continued to cause problems in the appellate courts. In *Lash v. State*,³⁴⁶ three robbers entered a pizza place, held two employees at gunpoint, took the cash register receipts from one of the employees, Lewis, and took personal property from both employees, Lewis and McCollon. Because Lewis' personal property was taken at the same time as the pizza place's receipts, the court of appeals found that there was only one robbery, instead of the two robberies on which the defendant had been convicted.³⁴⁷ A three-two majority of the Indiana Supreme Court reversed the court of appeals,³⁴⁸ although three separate opinions were authored.

Justice Pivarnik, writing for himself and Chief Justice Givan, focused on the fact that *property* had been *taken* from three different "individuals," the two employees and the pizza place. Therefore, three convictions for robbery were appropriate.³⁴⁹ Justice DeBruler concurred in the reversal but conducted an even more fact-sensitive analysis. He pointed out that the pizza place's cash register money was first taken from the register by one of the robbers, while another man held the two employees at gunpoint. Then the two employees were herded to the rear of the store and, under threat of force, were relieved of their personal money by the robbers. Based upon these elaborated facts, Justice DeBruler concluded that three robberies had occurred.³⁵⁰ Thus, Justice DeBruler was not focusing completely on whose property was taken but also was focusing on the manner in which the property was taken. In other words, if the takings were not accomplished at one time by one threat or act of violence, but instead the takings involved separate property, accomplished by separate threats, perhaps with a time interval in between, then they would be separate robberies.

Justice Prentice wrote a dissent, in which Justice Hunter joined. Justice Prentice believed that most of the problems in this area stemmed from an unfortunate choice of words used in the leading case of *McKinley v. State*.³⁵¹ In *McKinley*, the robber took a business establishment's money from the proprietor's wife and took the personal property of the proprietor. These were considered two robberies, but in justifying the decision, the supreme court in *McKinley* referred to the business property taken from the proprietor's wife as the "rob-

³⁴⁶433 N.E.2d 764 (Ind. 1982), *rev'd* 414 N.E.2d 338 (Ind. Ct. App. 1981).

³⁴⁷414 N.E.2d 338 (Ind. Ct. App. 1981), *rev'd*, 433 N.E.2d 764 (Ind. 1982).

³⁴⁸433 N.E.2d 764 (Ind. 1982).

³⁴⁹In another recent case, *Allen v. State*, 428 N.E.2d 1237 (Ind. 1981), Chief Justice Givan emphasized that the essence of a robbery is a "taking." In *Allen*, the supreme court held that, where the money of a credit union was taken from two tellers, there was only one robbery, a robbery from the credit union. *Id.* at 1240.

³⁵⁰433 N.E.2d at 767.

³⁵¹400 N.E.2d 1378 (Ind. 1980).

bbery of that business." Justice Prentice emphasized that robbery is the taking of property from a "person," while theft or burglary may be perpetrated against a business establishment.³⁵² The dissent then discussed *Williams v. State*,³⁵³ where it was held that only one robbery, not four, was committed when a robber took a bank's money from four different tellers at the same time. Justice Prentice said that *Williams* had applied a "rule of lenity" which was developed by the federal courts in similar cases. Justice Prentice also noted that this "rule of lenity," though not described as such, had been applied in several Indiana decisions since *Williams*.³⁵⁴ However, he recognized that other decisions had distinguished *Williams* on the basis that property taken from multiple victims belonged to multiple persons or entities.³⁵⁵

The dissent felt that, under the facts of this case, the defendant had committed only two offenses and was being unconstitutionally subjected to double jeopardy.³⁵⁶ However, the dissent appears to conduct a fact-sensitive analysis similar to Justice DeBruler's concurring opinion to reach this conclusion. It felt that the employee, Lewis, was put in fear only once, at the beginning of the robbery, and this was a "continuing state" when she was relieved of her personal property.³⁵⁷ Between these two analyses of the facts, Justice DeBruler's has more to commend it. The concurring opinion focused on the separate threats that were utilized to obtain the business' money and the personal property of Lewis. This is an objective standard that can be determined from the facts presented at trial. The dissent is inferring a mental state of the victims from the facts of the case, a more difficult determination, unless the dissent is suggesting that, as a matter of law,

³⁵²433 N.E.2d at 767. However, as defined in the penal code, at IND. CODE § 35-41-1-2 (1982), "person" includes a "corporation, partnership, unincorporated association, or governmental entity." Even Perkins seems unsure of whether robbery is a crime against the person or against property. He discusses robbery in his chapter on larceny but offers this apology:

Robbery violates the societal interest in the safety and security of the person as well as the social interest in the protection of property rights. In fact, as a matter of abstract classification, it probably should be grouped with offenses against the person rather than with offenses against property, but it is more expedient to include it at this point.

R. PERKINS, CRIMINAL LAW 285 (2d ed. 1969). The penal code classifies robbery in the division of "Offenses Against Persons." IND. CODE § 35-42-5-1 (1982).

³⁵³395 N.E.2d 239 (Ind. 1979).

³⁵⁴See, e.g., *Allen v. State*, 428 N.E.2d 1237 (Ind. 1981); *Lane v. State*, 428 N.E.2d 28 (Ind. 1981); *Rogers v. State*, 396 N.E.2d 348 (Ind. 1979).

³⁵⁵See *Duvall v. State*, 415 N.E.2d 718 (Ind. 1981); *Ferguson v. State*, 405 N.E.2d 902 (Ind. 1980); *Young v. State*, 409 N.E.2d 579 (Ind. 1980); *Hatcher v. State*, 410 N.E.2d 1187 (Ind. 1980). See also, *Richardson v. State*, 429 N.E.2d 229 (Ind. 1981).

³⁵⁶433 N.E.2d at 768.

³⁵⁷*Id.*

the state of fear will be presumed to continue throughout the robbery.

The most accurate description of the *Lash* case and the kinds of problems it presents was made by Justice DeBruler when he stated that the approach of looking at the facts and deciding how many unitary or integrated transactions occurred "involves an act of judgment, and not surprisingly can lead at times to differing judicial opinions, even on the same appellate court."³⁵⁸

³⁵⁸*Id.* at 766.

VII. Domestic Relations

JAMES A. BUCK*

A. Termination of Parental Rights

During the 1981 survey period, the United States Supreme Court decided a case that affects the standard of proof applied by Indiana courts in termination of parental rights cases.¹ The Court held that the standard of proof in a termination of parental rights case must be at least that of clear and convincing evidence.² Recent Indiana decisions have held that the appropriate standard is the lower civil standard of proof, which is by a preponderance of the evidence.³

In *Santosky v. Kramer*,⁴ the Supreme Court reversed a decision by a New York family court that had terminated the rights of the parents concerning three of their children, based upon a New York statute that allowed the State to terminate parental rights upon a finding that the child was permanently neglected. The trial court had rejected the parents' constitutional attack on the applicable New York statute, which required only a preponderance of the evidence to support this finding.⁵ The Supreme Court held that the due process clause of the fourteenth amendment requires a higher standard of proof than the civil standard of proof, which is by a preponderance of the evidence.⁶ The Court concluded that "[b]efore a state may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."⁷

The Court applied the due process analysis that it had enunciated in *Mathews v. Eldridge*⁸ and found that the New York statute was unconstitutional.⁹ The *Eldridge* analysis involves balancing three distinct factors: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the counter-

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¹See IND. CODE § 31-6-7-13(a) (1982). For a discussion regarding termination of parental rights and other adoption issues in recent Indiana cases, see Murphy, *Implementing the Indiana Juvenile Code*, 15 IND. L. REV. 765, 772 (1982).

²*Santosky v. Kramer*, 102 S. Ct. 1388 (1982).

³See, e.g., *Puntney v. Puntney*, 420 N.E.2d 1283 (Ind. Ct. App. 1981). But see *Ellis v. Knox County Dep't of Pub. Welfare*, 433 N.E.2d 847 (Ind. Ct. App. 1982) (holding that the part of the statute requiring preponderance of the evidence standard in termination of parental rights is not constitutional).

⁴102 S. Ct. 1388 (1982).

⁵*Id.* at 1393.

⁶*Id.* at 1391.

⁷*Id.*

⁸424 U.S. 319, 335 (1976).

⁹102 S. Ct. at 1396-97.

vailing governmental interest supporting use of the challenged procedure."¹⁰ Balancing these factors, the Court concluded:

In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight. Evaluation of the three *Eldridge* factors compels the conclusion that use of a "fair preponderance of the evidence" standard in such proceedings is inconsistent with due process.¹¹

B. Child Custody

1. *Jurisdiction.*—In *Brokus v. Brokus*,¹² the court of appeals held that an Indiana court has jurisdiction to award child custody, even though the court has no jurisdiction over the dissolution of marriage. *Brokus* involved a complex set of facts that developed in both Indiana and Ohio. An action for custody was brought in Indiana by the wife as part of her petition for a dissolution of marriage; the father brought a similar action in Ohio. The three children had spent time with each parent in both states during the year immediately preceding the filings for dissolution. One month after the Indiana court granted the final dissolution and awarded custody of the children to the mother, the Ohio court awarded custody to the father. The father appealed the Indiana court's order alleging that the Indiana court had no jurisdiction over the custody and dissolution actions because the mother did not meet the jurisdictional six-month residency requirement.¹³

The Indiana Court of Appeals held that the Indiana court did have jurisdiction to decide the custody issue because the six-month jurisdictional residency requirement, by statute, does not apply to a petition for child support.¹⁴ The court of appeals rejected the father's contention that the mandates of the Uniform Child Custody Jurisdiction Act (UCCJA),¹⁵ as adopted in Indiana, required the trial court to defer to

¹⁰*Id.* at 1394 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

¹¹102 S. Ct. at 1396-97.

¹²420 N.E.2d 1242 (Ind. Ct. App. 1981). For a discussion regarding the dissolution issues, see *infra* notes 73-77 and accompanying text.

¹³IND. CODE § 31-1-11.5-6(a) (1982) provides, in pertinent part: "At the time of the filing of a petition . . . at least one (1) of the parties shall have been a resident of the state . . . for six (6) months immediately preceding the filing of each petition."

¹⁴420 N.E.2d at 1246 (citing IND. CODE § 31-1-11.5-6(c) (Supp. 1981)). IND. CODE § 31-1-11.5-6(c) (1982) provides: "In an action for child support . . . the above residence provisions shall not be required. However, one (1) of such parties must reside in the state and county at the time of the filing of the action." *Id.*

¹⁵IND. CODE §§ 31-1-11.6-1 to -24 (1982).

Ohio in the custody decision.¹⁶ The court noted that the UCCJA "establishes two main places of initial jurisdiction: the 'home state' of the child and the state with a 'significant connection' to the child and one or both parents."¹⁷

The Indiana lower court did not have jurisdiction under the home state rule because the children had not lived in Indiana for six consecutive months immediately preceding the custody action. The court did, however, have jurisdiction under the significant connection rule because "during the five months the children had lived in Indiana, they were enrolled in nursery school and attended church regularly with their mother."¹⁸ The Indiana appellate court found that the Ohio court lacked jurisdiction under either the "home state" or the "significant connection" requirement because the children had been in Ohio for less than one month.¹⁹ In addition, the court of appeals found that, even though there was a simultaneous proceeding in another state, the trial court's exercise of jurisdiction did not violate the UCCJA because the Ohio proceeding was not in substantial conformity with the UCCJA.²⁰ The court of appeals, however, reversed the trial court's decision to award custody to the wife, because the appellate court found that the trial court had abused its discretion by being prejudiced in favor of the mother.²¹

2. *Custody Modification.*—In *Kissinger v. Shoemaker*,²² the court of appeals held that if a custodial parent dies, the surviving parent is not automatically awarded custody.

In *Kissinger*, the mother had been awarded custody of the children in the dissolution decree. Less than a year later, and one month after her marriage to the stepfather, the mother died in an accident. The children's natural father filed a petition for a writ of habeas corpus, seeking the return of his children who were being detained by the stepfather.²³ The trial court, after hearing the evidence, denied the petition.

¹⁶420 N.E.2d at 1248. An action for child custody is commenced by filing a petition for support or a petition for dissolution. The court stated that it would look at the content of a petition, not just the headings, to determine the true nature of the request. The court found that the mother's petition was a valid child support petition. *Id.* at 1246.

¹⁷*Id.* at 1247 (citing IND. CODE § 31-1-11.6-3(a)(1), -3(a)(2) (Supp. 1981)).

¹⁸420 N.E.2d at 1248.

¹⁹*Id.*

²⁰*Id.* at 1248-49 (citing *State v. Marion County Superior Court*, 403 N.E.2d 806 (Ind. 1980)).

²¹420 N.E.2d at 1249. "The partial manner in which the trial court conducted this hearing, in effect, denied Robert of his right to a fair trial, and therefore the judgment must be reversed." *Id.*

²²425 N.E.2d at 208 (Ind. Ct. App. 1981).

²³The stepfather filed a petition for temporary and permanent custody of the

On appeal, the father contended that "when a parent, who is granted custody of the children in a dissolution decree dies, custody of the children automatically inures to the surviving parent."²⁴ The court of appeals stated, however, that the "rights of parents are not absolute and must yield to the welfare and best interest of the child."²⁵ The court outlined a three-step analysis to be used in determining whether a particular custody award would be in the best interests of the child.

First, it is presumed it will be in the best interests of the child to be placed in the custody of the natural parent. However, this is a rebuttable presumption. Therefore, secondly, to rebut this presumption, it must be shown that there is, (a) unfitness, (b) long acquiescence, or (c) voluntary relinquishment such that the affections of the child and third party have become so interwoven that to sever them would seriously mar and endanger the future happiness of the child. The third step is that upon a showing of one of these above three factors, then it will be in the best interests of the child to be placed with the third party.²⁶

Applying this analysis to the father's petition, the court of appeals held that the trial court had not abused its discretion in finding that the evidence presented by the stepfather rebutted the presumption favoring the natural parent.²⁷ The appellate court found that although there was no evidence of either voluntary relinquishment or long acquiescence by the father, there was sufficient evidence of the father's unfitness.²⁸ The court, therefore, affirmed the trial court's denial of the father's petition. The appellate court, however, did not determine whether custody should be awarded to the stepfather, because that question was for a custody proceeding.²⁹

3. Visitation.—*In re Marriage of Ginsberg*³⁰ presented the court of appeals with the question whether the trial court's order allowing a child an extended visit with the noncustodial parent was a modification of custody or of visitation rights. In that case, the mother, who

children, which was separated from the hearing on the father's petition for writ of habeas corpus. 425 N.E.2d at 210.

²⁴*Id.*

²⁵*Id.*

²⁶*Id.* at 210-11 (citing *Hendrickson v. Binkley*, 161 Ind. App. 388, 393-94, 316 N.E.2d 376, 380 (1974), *cert. denied*, 423 U.S. 868 (1975)).

²⁷425 N.E.2d at 211.

²⁸*Id.* The evidence supporting the finding that the father was unfit included evidence that he had failed to make any support payments as ordered, that he had neither visited nor communicated with the children, that his employment history showed instability, and that he had previously mistreated the children.

²⁹425 N.E.2d at 211.

³⁰425 N.E.2d 656 (Ind. Ct. App. 1981).

was the noncustodial parent, petitioned for a modification of the custody order. The dissolution decree had granted the mother reasonable visitation rights; however, the mother, who was living in Italy, wanted to have the child during the summer because it was impractical to schedule weekend or holiday visits as contemplated by the dissolution decree.

Although the trial court found that there was not a change in circumstances that made the original terms of the decree unreasonable,³¹ the trial court granted the petition and gave the mother "temporary custody" during the summer.³² The father appealed the trial court's decision. He contended that the court had abused its discretion by modifying the custody order without finding a change in circumstances so substantial and continuing as to make the terms of the decree unreasonable, which is required by the Dissolution Act when modifying an earlier decree.³³

The court of appeals held that the trial court did not err because the court had modified "visitation," not "custody," and because the trial court had found that a substantial and continuing change in circumstances did exist to make the mother's visitation rights unreasonable.³⁴ The court stated:

It may well be that the line between visitation and divided custody becomes blurred in cases such as this where one parent moves so far in distance from the custodial parent that a traditional visitation schedule is impractical or impossible. However, here it is reasonable to conclude Mother's "temporary custody" of the child during the summer months is visitation because of her residence in Italy for a period of three years. We specifically limit this holding to the facts of this case and do not pretend to predict our ruling would be the same if the noncustodial parent lived within a reasonable proximity of the custodial parent or was absent for a shorter period of time.³⁵

C. Child Support

1. *Modification of Order.*—In *Meehan v. Meehan*,³⁶ the Indiana Supreme Court clarified several issues relating to child support. In *Meehan*, the supreme court addressed the following issues: (1) whether

³¹*Id.* at 657.

³²*Id.*

³³IND. CODE § 31-1-11.5-22(d) (1982).

³⁴425 N.E.2d at 658. The correct standard to apply when modifying visitation is "best interests of the child." IND. CODE § 31-1-11.5-24 (1982). The court of appeals held the trial court's application of the incorrect standard to be harmless error. 425 N.E.2d at 658 n.2.

³⁵425 N.E.2d at 658.

³⁶425 N.E.2d 157 (Ind. 1981).

the court may "incorporate" a settlement agreement, which includes the terms for child support, into the final decree; (2) whether a decree that incorporates a settlement agreement may be modified; and (3) whether the standard for modifying an incorporated agreement is the same as the standard for modifying a dissolution decree.

In *Meehan*, the father petitioned in 1979, to modify his child support obligation. The father presented evidence that since the 1976 dissolution decree, his ex-wife had remarried and her new husband had assumed the cost of most of the living expenses. Additionally, the ex-wife was now operating her own small business. The father's income, however, had not kept pace with inflation. One of the four children was now emancipated and no longer lived with his mother. A second child was in college and was at home only during the summer months. Additionally, the youngest child now wanted to live with the father. The trial court granted the father's petition to modify the earlier order that he pay "the sum of \$500.00 a month for the care and keep" of the children.³⁷

The ex-wife appealed the modification alleging that the trial court had abused its discretion by modifying the decree, which was an incorporated settlement agreement between the parties.³⁸ The ex-wife also argued that the trial court had abused its discretion by modifying the decree without a showing of a change in circumstances so substantial and continuing as to make the terms of the original decree unreasonable, as required by statute.

In reversing the trial court's modification, the court of appeals found that the settlement agreement had been incorporated into the dissolution decree by "paraphrase and reference" and, therefore, could only be modified by a showing that the terms had become "clearly unreasonable."³⁹ The father appealed that decision and the supreme court granted transfer.

According to the Indiana Code, there are six provisions in a dissolution decree that can always be modified by the court when dependent children are involved. These provisions concern: (1) the custody of the children;⁴⁰ (2) the support of the dependent children;⁴¹ (3) the noncustodial parent's visitation rights;⁴² (4) the health care of the children; (5) the children's religious upbringing; and (6) the children's educational costs and requirements.⁴³ This modification can

³⁷*Id.* at 158-59.

³⁸*Meehan v. Meehan*, 415 N.E.2d 762, 765 (Ind. Ct. App. 1981).

³⁹*Id.* at 767.

⁴⁰IND. CODE § 31-1-11.5-22(d) (1982).

⁴¹*Id.* § 31-1-11.5-17.

⁴²*Id.* § 31-1-11.5-24(b).

⁴³*Id.*

occur whether the court's dissolution decree incorporates the parties' agreement on these issues, pursuant to Indiana Code section 31-1-11.5-10, or whether the court enters a separate decree after a trial on these issues.

In a four to one decision written by Justice Hunter, the supreme court vacated the court of appeals' decision and reinstated the trial court's modification of the child support order.⁴⁴ The supreme court first addressed the issue of the incorporation of the agreement in the decree. Because under section 31-1-11.5-10(b)⁴⁵ the trial court has the discretion to accept, to modify, or to reject an agreement, the supreme court held that to effectively incorporate the parties' settlement agreement into the dissolution decree, the trial court must do so by express and unequivocal language.⁴⁶ The court stated that "[a]bsent an effective incorporation and merger . . . a settlement agreement or its unincorporated portions is not binding on the parties."⁴⁷ This should be a good lesson to domestic relations practitioners because it reflects the trend of both the court of appeals and the supreme court, which has been to take the words of the statute one by one, to analyze them, and to concentrate on their exact meaning in order to give the legislative intent every opportunity to survive judicial scrutiny.

The supreme court went further and found that, even if the incorporation were effective, the court of appeals had erred in reversing the trial court.⁴⁸ Justice Hunter found that the standard pronounced in section 17(a) of the Dissolution Act,⁴⁹ which allows a modification upon a showing of changed circumstances so substantial and continuing as to make the terms unreasonable, is the only standard to apply when modifying child support orders, regardless of how the terms had originated.⁵⁰ Justice Hunter stated that it was imperative that the sec-

⁴⁴425 N.E.2d at 157-58.

⁴⁵IND. CODE § 31-1-11.5-10(b) (1982) provides:

In an action for dissolution of the marriage the terms of the agreement if approved by the court shall be incorporated and merged into the decree and the parties ordered to perform them, or the court may make provisions for disposition of property, child support, maintenance, and custody as provided in this chapter.

⁴⁶425 N.E.2d at 159. Otherwise, particularly where a partial acceptance and rejection was at issue, the resolution of whether the trial court intended to incorporate and merge a settlement agreement or particular portions thereof would depend on conjecture. *Id.*

⁴⁷*Id.* (citing *Anderson v. Anderson*, 399 N.E.2d 391 (Ind. Ct. App. 1979); *Grace v. Quigg*, 150 Ind. App. 371, 276 N.E.2d 594 (1971)).

⁴⁸425 N.E.2d at 159.

⁴⁹IND. CODE § 31-1-11.5-17(a) (1982).

⁵⁰425 N.E.2d at 160. In other words, even though a child support order has been incorporated into the terms of a settlement agreement and has been intended to be a permanent determination by the parties, it is of no consequence to the question whether the order should subsequently be modified. *Id.*

tion 17(a) standard be followed even if it "flies in the face of our visceral inclinations as jurists to rule that 'a contract is a contract.'"⁵¹ Thus, the court of appeals deviated from the statutory standard when it required that in order to modify a support agreement, which was incorporated in the court's decree, there must be a showing that the terms of the agreement are *clearly unreasonable*.⁵² The supreme court found that the court of appeals' decision rested in contract law and not in the requirements and policy of the Dissolution Act.⁵³ Thus, the court of appeals incorrectly treated the modification of a child support order with the same deference due a negotiated property settlement agreement.

To bolster its decision, the supreme court noted that due to the Meehans' situation, if the trial court had refused to modify the support order, the \$500 payment to the ex-wife would have become de facto spousal maintenance.⁵⁴ That result would be contrary to law because there was no evidence of the ex-wife's physical or mental incapacity presented to support an award of maintenance.

2. *Delinquency in Payment of Support*.—A long line of Indiana decisions holds that a parent may neither reduce the amount of support he is ordered to pay nor change the method by which he pays support without receiving a modification in court.⁵⁵ Additionally, Indiana case law holds that reduction can only apply prospectively.⁵⁶ Applying these rules in *Isler v. Isler*,⁵⁷ the court of appeals had little difficulty in reversing the trial court's computation of the husband's arrearages in support, because the computed arrearage was inconsistent with the amount the husband owed, yet no modification order existed. In an opinion denying the husband's petition for rehearing, however, the court of appeals suggested that in certain factual situations equitable considerations *may* create a "narrow exception" to these rules.⁵⁸

Although the husband admitted owing over \$5,000, the trial court had awarded \$1,200 to the wife.⁵⁹ On appeal, the court reasoned that the trial court could have arrived at the \$1,200 figure only by giving

⁵¹425 N.E.2d at 160. Justice Hunter goes on to state: "If our courts deviate even slightly from this delicate balance struck by the legislature, parties will be inhibited in their negotiations and the purpose of the Act will be frustrated." *Id.*

⁵²425 N.E.2d at 160-61.

⁵³*Id.* at 161 n.1.

⁵⁴*Id.* at 163.

⁵⁵See, e.g., *Whitman v. Whitman*, 405 N.E.2d 608, 614 (Ind. Ct. App. 1980).

⁵⁶*Jahn v. Jahn*, 385 N.E.2d 488 (Ind. Ct. App. 1979).

⁵⁷422 N.E.2d 416 (Ind. Ct. App. 1981).

⁵⁸*Isler v. Isler*, 425 N.E.2d 667, 669 (Ind. Ct. App. 1981) (denying petition for rehearing).

⁵⁹422 N.E.2d at 418.

the husband "credit" for the amount owed for the support of a son who was emancipated prior to age twenty-one and for the amount spent when the husband had the children in his home.⁶⁰ Because the father could not "claim, without a judicial modification, any reduction of the undivided support order until *all* the children [were] emancipated, and . . . [he could not] claim credit against accrued support for the weeks [two of the children] lived with him,"⁶¹ the court of appeals held that the trial court erred in its calculation of the accrued support arrearage. In his petition for rehearing, the husband requested that the appellate court reconsider its application of the general rule.⁶²

In its opinion denying the petition for rehearing, the court of appeals noted that two categories exist for cases that involved non-conforming payments. The first category includes cases in which the parent makes expenditures for the children during short visits, for gifts, and as payments in cash. Because these types of expenditures are not easily proven, the courts have refused to accept them as claims for credit. To promote stability, the courts have required that the payments be made in the prescribed manner.⁶³ The second general category includes cases in which the support order is indivisible for several dependent children. On his own volition, the obligated parent often will reduce the support payment pro rata, as the children become emancipated. However, because the amount in the original decree is usually inadequate but all that the parent could afford to pay, courts will generally deny a request for a reduction in payments, in order to ease the burden on the custodial parent.⁶⁴

In recognizing a "narrow exception" to the general rule, the court of appeals found that there may be cases that do not fit in either of these two general categories.⁶⁵ This narrow exception is applicable when a *de facto* change of custody has occurred by agreement between the parents.⁶⁶ In such an instance, the court may "allow credit against the accrued support for the reason that the obligated parent

⁶⁰*Id.*

⁶¹*Id.* at 419 (citing *Ross v. Ross*, 397 N.E.2d 1066 (Ind. Ct. App. 1979); *Jahn v. Jahn*, 385 N.E.2d 488 (Ind. Ct. App. 1979); *Haycraft v. Haycraft*, 375 N.E.2d 252 (Ind. Ct. App. 1978)).

⁶²425 N.E.2d at 668.

⁶³*Id.* at 669.

⁶⁴*Id.* at 669-70.

⁶⁵*Id.*

⁶⁶425 N.E.2d at 670. A *de facto* custodial change could occur: where the obligated parent, by agreement with the custodial parent, has taken the child or children into his or her home, has assumed custody of them, has provided them with food, clothing, shelter, medical attention, and school supplies, and has exercised parental control over their activities and education for an extended period of time

has merely furnished support in a different manner under circumstances easily susceptible of proof. Such a result would be equitable, and would not conflict with the holdings of the reported cases."⁶⁷ Thus, although the court of appeals affirmed its prior order to remand the case for retrial on the issue of the computation of arrearages, its opinion in denying the petition for rehearing gives further instructions for the court on retrial of this issue.

In *Statzell v. Gordon*,⁶⁸ the mother appealed the denial of her request to recover the son's college expenses from the father. Under the original child support order, the father was to pay all college expenses. He made the payments for approximately two years, then stopped. The mother paid the remaining expenses from her own funds. After the son had graduated and was emancipated, the mother sought reimbursement from the father. The trial court found that the mother had "volunteered" to pay the expenses, and that the dissolution decree "vested no rights in [the mother] and did not constitute a judgment in her favor."⁶⁹ The mother appealed.

The court of appeals characterized the basic issue in the case as whether the mother had to file an independent complaint in a separate lawsuit in order to recover the college expenses. The court of appeals concluded that under *Kuhn v. Kuhn*,⁷⁰ the mother's petition for reimbursement was sufficient to establish the sum of the delinquent payments; thus, the court of appeals reversed the trial court's judgment and remanded the case.⁷¹ The court also noted that the child's emancipation was irrelevant because "notwithstanding the inability of a custodial parent to enforce support orders by contempt after the child's emancipation, college expenses advanced by the custodial parent . . . may be recovered even after the child's emancipation."⁷²

As a practical matter, to recover either the support or college expenses, or both, the custodial parent could either file an original action or file a new action under the old dissolution of marriage cause number, both of which seem to be procedurally acceptable. In any event, strict proof of the expenditures by the spouse seeking reimbursement will be required.

⁶⁷425 N.E.2d at 670.

⁶⁸427 N.E.2d 732 (Ind. Ct. App. 1981).

⁶⁹*Id.* at 733.

⁷⁰402 N.E.2d 989 (Ind. 1980).

⁷¹427 N.E.2d at 734.

⁷²*Id.* The court cited IND. CODE § 31-1-11.5-12(d) (1982) as a "statutory exception for educational expenses to the general rule that a parent's support duty terminates at the time of emancipation." *Id.*; see also *Linton v. Linton*, 166 Ind. App. 409, 336 N.E.2d 687 (1975).

D. Dissolution

1. *Attacks on Dissolution Decrees.*—In *Brokus v. Brokus*,⁷³ the husband appealed the granting of the wife's dissolution petition, which also served as the basis of a custody determination.⁷⁴ At the time of the marriage and until a few months prior to the filing of the dissolution petition, the husband had been in the Army. During their marriage, the parties and their children had lived in numerous states, including Indiana. The parties came to Indiana in June 1978 to live with the wife's mother while the husband sought employment. The husband eventually found a job in Ohio and moved, while the rest of the family remained in Indiana. The wife filed her dissolution petition on November 14, 1978—one month short of the six-month residency requirement of the Indiana Dissolution Act.⁷⁵ During this time, the husband was attempting to gain custody of the children through proceedings in Ohio. The Indiana trial court granted the wife's petition for dissolution, finding as fact that she had lived in Indiana since June 1978 and that the petition was filed in November 1978.⁷⁶ The court of appeals reversed the trial court's decision holding that the six-month residency requirement was jurisdictional and, therefore, the court had no authority to grant the dissolution petition.⁷⁷

2. *Distribution and Division of Property.*—In *In re Marriage of Taylor*,⁷⁸ the trial court reviewed the equities of the situation and chose the date of informal separation as the specific date to use when determining the value of the parties' marital property in a dissolution case; however, the trial court was reversed on appeal. In *Taylor*, the parties separated in October 1974 and informally divided their personal assets and belongings. Each party became financially independent. During the separation, the wife remained in the house, which was owned by the parties as tenants by the entireties. The wife took over the mortgage payments, maintained the house and supported their child.

In June 1979, over four years after the parties had informally separated, the wife filed her petition for dissolution. The trial court awarded the marital residence to the wife and, using the valuation of the property as of October 1974, ordered the wife to pay her hus-

⁷³420 N.E.2d 1242 (Ind. Ct. App. 1981). For a discussion of the custody issue, see *supra* notes 12-21 and accompanying text.

⁷⁴*Id.* at 1244.

⁷⁵IND. CODE § 31-1-11.5-6 (1982).

⁷⁶420 N.E.2d at 1245.

⁷⁷*Id.* at 1245-46.

⁷⁸425 N.E.2d 649 (Ind. Ct. App. 1981), vacated *sub nom.*, *Taylor v. Taylor*, 436 N.E.2d 56 (Ind. 1982).

band \$2,000 for his share of the equity in the house.⁷⁹ The husband appealed the award, claiming that the trial court had abused its discretion by using the 1974 value of the house instead of the 1979 value. Judge Shields, writing for the majority, found that there was a necessity for a date certain to be used in determining the value of marital property and reversed the trial court's decision.⁸⁰ The majority reasoned that if the trial court were allowed to decide which date should be used to value the property based on the "equities of the case," as argued by the dissent, then the statutory requirement of a "just and reasonable" division would be ignored. Relying upon the "just and reasonable" mandate of section 31-1-11.5-11(a), Judge Shields used the "date of final separation," which was the date the petition was filed, as the most reasonable date to be used in determining the property's value.⁸¹

Dissenting strongly, Chief Judge Buchanan stated that he would have affirmed the trial court's decision based on the "equities of the case." He stated:

The repeated call for *just, proper, and reasonable* property divisions and the requirement that the trial court's decision in dividing property be an *informed* one convince me that in evaluating marital property, the trial court may choose any method of evaluation based on the evidence before it that best suits the equities of the case. Evaluation therefore becomes

⁷⁹425 N.E.2d at 650.

⁸⁰*Id.* Judge Shields wrote:

In a marriage of any duration the possible equitable valuation dates are limitless. Hence, the necessity for a date certain is obvious. Meaningful settlement discussions would be virtually impossible; trials would be lengthened; fees for experts would skyrocket as they assimilate the necessary data to have an opinion on the fair market value of the numerous items of marital property on any number of dates, including, for example, the date of first separation, the date of final separation, the date of filing the petition, the date of filing the cross-petition, and the date of trial. Therefore, the statutory mandate of a just and reasonable division requires the division of marital property be based on values determined as of a date certain.

Id.

⁸¹425 N.E.2d at 651 (citing IND. CODE § 31-1-11.5-11(a), (b) (Supp. 1981)). Judge Shields reasoned:

Thus, the date has significance in determining the property within the marital pot. If that date puts a lid on the pot, it is logical to simultaneously determine the value of its contents. If the value of items in the marital pot increases or decreases after the date of final separation due to the conduct of the parties, the trial court may, of course, take this into account under IC 31-1-11.5-11. Valuation of marital property on the date of final separation will also assist the parties in marshalling the evidence and appraisals of property in preparation for the final hearing date.

Id.

an indispensable part of division. The power to evaluate can reasonably be inferred from the power to divide; indeed it is a necessary component.

. . . It was neither unjust nor inequitable for the court to conclude as to that appreciation that since [the husband] suffered no pains, he should take no gains.⁸²

Upon granting the wife's petition for transfer, the supreme court vacated the appellate court decision and affirmed the trial court decision.⁸³ Justice Hunter, writing for the court, quoted Chief Judge Buchanan's dissenting opinion with approval.⁸⁴ The supreme court concluded that the issue of which date should be used to value the property is a question for the legislature, not the courts. Therefore, because the legislature has not acted, the supreme court concluded that a trial court is not limited to a specific date to value the property. Rather, a trial court is guided only by what is "just and reasonable" under the particular circumstances of each case. In the instant case, the court found that the trial court's decision to determine the value of the property as of the date the parties informally separated was proper because, in reaching that decision, the trial court considered each spouse's contribution to the property's maintenance, and each spouse's conduct as well as each individual's economic circumstances.⁸⁵ The supreme court held that, therefore, the trial court had not abused its discretion in determining the value of the property.⁸⁶

In practice, the trial lawyer is presented with the problem of choosing a date for valuation only "when the equities of the case" dictate that such a choice be made. In the event that the parties have been informally separated for a number of years before one party files a petition for dissolution, the appraisal values for the marital property that are submitted by each party could be vastly different. For example, one of the parties might submit all appraisals based on the date of informal separation, while the other party submits appraisals based on the date of the statutory separation, the date the petition was filed. In such a case, the attorneys might be wise to seek a pretrial conference and an early judicial determination of the "date of separation for valuation purposes," in order to avoid a morass of conflicting testimony at trial as to property value.

In another property division case, *Swinney v. Swinney*,⁸⁷ the court

⁸²425 N.E.2d at 652 (Buchanan, C.J., dissenting).

⁸³Taylor v. Taylor, 436 N.E.2d 56 (Ind. 1982), vacating *In re Marriage of Taylor*, 425 N.E.2d 649 (Ind. Ct. App. 1981).

⁸⁴436 N.E.2d at 59.

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷419 N.E.2d 996 (Ind. Ct. App. 1981).

of appeals reversed the trial court's award of substantially all the marital property to the wife, even though the parties acquired most of the property through gifts from the wife's father. The court of appeals held that the ninety-seven percent to three percent distribution ratio indicated that the trial court had excluded the gifts from the "marital pot" and thus, the distribution award was an abuse of discretion.⁸⁸

Under the Dissolution Act, the trial court is not required to divide the marital assets in any set proportions.⁸⁹ The legislative mandate is to divide the property "in a just and reasonable manner."⁹⁰ In past decisions, various extreme proportions have been upheld.⁹¹ *Swinney* presented the court with the difficult issue of how to make a "just and reasonable" disposition of marital property that was obtained primarily by gift or inheritance from one spouse's family.

Although the court cannot systematically exclude property received by gift or inheritance,⁹² the court must consider the source of the property in determining a "just and reasonable" division.⁹³ If the trial court awards nearly all the property to the spouse who received the gift or the inheritance, as in *Swinney*, the judgment could be reversed on appeal, if the appellate court fails to find sufficient evidence to justify the award.

Exactly what evidence would support an award of nearly all the property to the spouse who received the gift or the inheritance appears to be unclear because the supreme court, in a three to two decision, denied transfer in *Swinney*.⁹⁴ Justice Hunter filed a dissenting opinion to the denial in which he noted the many "unique circumstances" in the case that would support the trial court's decision.

When a case is as clearly black and white as *Swinney*, logic dictates that the majority's opinion is incorrect. By following the majority's reasoning, a trial court would have to give the husband some of the gifts the wife received and give the wife some of the gifts the husband received. As Justice Hunter advocates in his dissent,⁹⁵ the trial court should have the discretion to determine what would be a "just and reasonable" disposition in cases where one spouse receives substantial property through gift or inheritance.⁹⁶

⁸⁸*Id.* at 999.

⁸⁹IND. CODE § 31-1-11.5-11 (1982).

⁹⁰*Id.* § 31-1-11.5-11(b).

⁹¹See, e.g., *Libunao v. Libunao*, 388 N.E.2d 574 (Ind. Ct. App. 1979); *In re Marriage of Lewis*, 172 Ind. App. 463, 360 N.E.2d 855 (1977); *Johnson v. Johnson*, 168 Ind. App. 653, 344 N.E.2d 875 (1976).

⁹²*Wilson v. Wilson*, 409 N.E.2d 1169 (Ind. Ct. App. 1980).

⁹³*Swinney v. Swinney*, 426 N.E.2d 658, 659 (Ind. 1981) (Hunter, J., dissenting).

⁹⁴426 N.E.2d 658 (Ind. 1981).

⁹⁵*Id.* (Hunter, J., dissenting).

⁹⁶See *McBride v. McBride*, 427 N.E.2d 1148, 1152 (Ind. Ct. App. 1981).

The court of appeals adopted a new rule in *In re Marriage of Church*⁹⁷ concerning the burden of proving the value of the marital property. The husband in *Church* appealed the trial court's division of the marital property, claiming that the court had abused its discretion by failing to place a value on certain assets before distributing them to the wife.⁹⁸

In affirming the trial court's distribution, the court of appeals acknowledged a line of case law that supported the husband's allegation of error;⁹⁹ however, the court relied on another line of cases that upholds the distribution of unvalued property by a trial court, if the property were "not unique and [did] not require expertise for evaluation."¹⁰⁰ The court of appeals stated that "[t]he proper role of a court in dividing property pursuant to a dissolution is to review carefully all the evidence and then to divide the property based on a consideration of the factors listed in IC 31-1-11.5-11(b)."¹⁰¹ The court reasoned, therefore, that the burden of proving the valuation of the marital property should be on the parties, not on the court. Thus, the court held that the trial court's distribution of nonvalued property was not in error because "any party who fails to introduce evidence as to the specific value of the marital property at the dissolution hearing is estopped from appealing the distribution on the ground of trial court abuse of discretion based on the absence of that evidence."¹⁰²

*Gower v. Gower*¹⁰³ presented the court with a novel situation in which the adopted children of a couple intervened¹⁰⁴ in the dissolution action and sought a share of the marital property. The children claimed that they were entitled to part of the marital property because the social security and Veterans Administration benefits they had received from their deceased natural father had been "commingled with the marital estate and used in part for the acquisition of marital property."¹⁰⁵ Although the trial court found that in "fairness and equity" the children were entitled to an award, the court refused to grant one because there was no legal basis for making such an

⁹⁷424 N.E.2d 1078 (Ind. Ct. App. 1981).

⁹⁸*Id.* at 1081. The trial court had awarded the wife a car, a refrigerator, a dryer, and a stove without assigning a value to them. *Id.* at 1080.

⁹⁹*Id.* at 1081 (citing *Howland v. Howland*, 166 Ind. App. 572, 337 N.E.2d 555 (1975); *Hardiman v. Hardiman*, 152 Ind. App. 675, 284 N.E.2d 820 (1972)).

¹⁰⁰424 N.E.2d at 1082 (citing *Cross v. Cross*, 159 Ind. App. 592, 308 N.E.2d 717 (1974); *Jackman v. Jackman*, 156 Ind. App. 27, 294 N.E.2d 620 (1973)).

¹⁰¹424 N.E.2d at 1082 (citation omitted).

¹⁰²*Id.* at 1081 (footnote omitted).

¹⁰³427 N.E.2d 703 (Ind. Ct. App. 1981).

¹⁰⁴For the proposition that third-parties may intervene in dissolution actions, see *State ex rel. Kleffman v. Bartholomew Circuit Court*, 245 Ind. 539, 200 N.E.2d 878 (1964); *State ex rel. American Fletcher Nat'l Bank & Trust Co. v. Spencer Circuit Court*, 242 Ind. 74, 175 N.E.2d 23 (1961).

¹⁰⁵427 N.E.2d at 707.

award.¹⁰⁶ The two children joined their mother in an appeal and alleged that, in light of the court's own finding, the trial court had erred in not granting the award.

The court of appeals affirmed the trial court's decision not to make an award to the children.¹⁰⁷ Because the legislature has set out specific guidelines concerning the distribution of marital property for courts to follow in dissolution cases, the court refused "to add a provision to this statute which the legislature clearly chose not to include."¹⁰⁸ The court held that because there was neither a statutory nor a case law basis for an award of part of the marital property to the children, the trial court had not erred in refusing to grant such an award. In addition, the court noted that the wife, who had custody of the children, had received three times more property than the husband, thus the trial court's distribution of property was not an abuse of discretion, despite the trial court's finding concerning "fairness and equity."¹⁰⁹

In *Hasty v. Hasty*,¹¹⁰ the court of appeals reversed part of the trial court's property division order that required the husband to pay the wife eleven and one-half percent interest on the wife's award of \$404,177 until the award was paid in full. The husband claimed that the trial court's rate of interest was above the current legal maximum of eight percent.¹¹¹ The court stated:

Our holding is made in full realization that the current posture of the law encourages defendants to delay satisfaction of money judgments until the last possible moment. During the period he retains control of the judgment amount, a defendant may by investment earn thereon an amount far in excess of the statutory interest rate permitted. Remedial measures in this respect, however, lie within the sole prerogative of our General Assembly.¹¹²

In *In re Marriage of Bradley*,¹¹³ the court of appeals reiterated the importance of careful drafting of dissolution property settlement

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 708. For further statutory guidelines, see generally IND. CODE §§ 31-1-11.5-1 to -24 (1982).

¹⁰⁸427 N.E.2d at 707-08. See IND. CODE § 31-1-11.5-11 (1982).

¹⁰⁹427 N.E.2d at 707-08. The court of appeals also noted that there was no evidence that the children had been deprived by the family's use of their benefits, nor was there evidence that the father had tried to defraud them on their benefits.

¹¹⁰427 N.E.2d 1119 (Ind. Ct. App. 1981).

¹¹¹*Id.* at 1120. The husband relied upon IND. CODE § 24-4.6-1-101 (1976). The statutory rate of interest is currently 12%. IND. CODE § 24-4.6-1-101 (1982).

¹¹²427 N.E.2d at 1120.

¹¹³433 N.E.2d 54 (Ind. Ct. App. 1982).

agreements. In *Bradley*, the former wife sought to have a commissioner appointed to sell the marital home that was held by the parties as tenants in common. The property settlement agreement contained a provision that the house, in which the husband lived, was to be sold when the husband remarried.¹¹⁴ The wife contended that this provision had been met by the husband's cohabitation with another woman, thus requiring the sale of the house.¹¹⁵ The trial court denied the wife's petition, resting its decision on the terms of the agreement.

The court of appeals affirmed the trial court's denial of the wife's petition. The court based its decision on the policy expressed by the legislature encouraging parties to reach agreements.¹¹⁶ The court also noted that the parties had bargained fairly for the terms of the property settlement. Relying on Indiana contract cases, the court of appeals concluded that the courts are not at liberty to make contracts for individuals.¹¹⁷ Also, the court recognized the "black-letter" rule that the intent of the parties should be determined by the language employed in the contract, unless it is ambiguous.¹¹⁸ The court held that the terms of the agreement were not ambiguous and the intent of the parties was clear from the contract.¹¹⁹ It should be noted that pursuant to section 10 of the Dissolution Act, the parties could well have made "cohabitation" one of the "events," which would then require a sale of the real estate.

It should be noted that in determining the marital pot, the application of Indiana Code section 31-1-11.5-2(d),¹²⁰ which provides that "[t]he term 'property' means all the assets of either party or both parties, including a present right to withdraw pension or retirement benefits," now fixed by the date of filing as the date of separation, can produce unusual results. For example, suppose the parties had been married to each other three different times.¹²¹ In both divorce

¹¹⁴*Id.* at 54-55. The pertinent clause in the agreement provides:

a. At the end of ten (10) years from the date of the dissolution of this marriage; or
b. Upon the husband's remarriage; or
c. In the event that the wife becomes disabled and unable to work for a continuous period of 180 days due to her disability.

Id.

¹¹⁵*Id.* at 55.

¹¹⁶433 N.E.2d at 55.

¹¹⁷*Id.* (citing *Automobile Underwriters v. Camp*, 217 Ind. 328, 27 N.E.2d 370 (1940); *Workman v. Douglas*, 419 N.E.2d 1340 (Ind. Ct. App. 1981)).

¹¹⁸433 N.E.2d at 55 (citing *Albert Johann & Sons Co. v. Echols*, 143 Ind. App. 122, 238 N.E.2d 685 (1968)).

¹¹⁹433 N.E.2d at 55 ("In the present case, the terms of the agreement are clearly stated. None of the conditions decided upon have been met. Therefore, there is no right to have the property sold.").

¹²⁰IND. CODE § 31-1-11.5-2(d) (1982).

¹²¹This fact situation was an actual case handled by this author.

actions, the husband was awarded his professional practice, an operating bar, and a tract of real estate. In the second divorce, however, the real estate was subject to a substantial lien in the wife's favor. The question now arises as to whether, by virtue of the third marriage of the parties and the operation of section 2(d), there is a merger of the wife's lien with the husband's interest in the real estate. It seems obvious that further legislation is needed to clear up the definition of the term "property" to address these kinds of problems.

E. Paternity

The United States Supreme Court in *Mills v. Habluetzel*¹²² held that a Texas statute that established a one-year statute of limitations on paternity suits was unconstitutional.¹²³ In a paternity suit that was brought by the mother and the welfare department when the child was nineteen months old, the alleged father used the Texas statute of limitations as a defense. Although recognizing Texas' interest in preventing fraudulent or stale claims, the Court concluded that the statute violated the equal protection clause of the fourteenth amendment.¹²⁴ The Court applied a two-pronged analysis to invalidate the Texas statute.¹²⁵ The Court stated:

First, the period for obtaining support granted by Texas to illegitimate children must be sufficiently long in duration to present reasonable opportunity for those with an interest in such children to assert claims on their behalf. Second, any time limitation placed on that opportunity must be substantially related to the State's interest in avoiding the litigation of stale or fraudulent claims.¹²⁶

The Court held that the one-year limitation failed the applicable test.¹²⁷ The one-year limitation allowed insufficient opportunity to assert claims in light of the mother's financial difficulties surrounding the birth of a child out-of-wedlock, the mother's likely continuing affection for the child's father, the mother's desire to avoid disapproval of the family and the community, and the mother's emotional strain and confusion.¹²⁸ All these factors would likely result in delaying the

¹²²102 S. Ct. 1549 (1982). For Indiana's position, see *In re M.D.H.*, 437 N.E.2d 119 (Ind. Ct. App. 1982).

¹²³102 S. Ct. at 1556. TEXAS FAM. CODE ANN. § 13.01 (Vernon Supp. 1982) provides: "A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred."

¹²⁴102 S. Ct. at 1556.

¹²⁵*Id.* at 1555.

¹²⁶*Id.*

¹²⁷*Id.*

¹²⁸*Id.*

assertion of a paternity action. The Court also held that the one-year limitation was not substantially related to Texas' asserted interests. The Court stated that it could "conceive of no evidence essential to paternity suits that invariably will be lost in only one year, nor is it evident that the passage of twelve months will appreciably increase the likelihood of fraudulent claims."¹²⁹

A child born during a marriage is presumed to be legitimate.¹³⁰ "[This] presumption is one of the strongest known to the law and may only be rebutted by direct, clear, and convincing evidence."¹³¹ In *H.W.K. v. M.A.G.*,¹³² H.W.K., the alleged father, unsuccessfully relied on the presumption of legitimacy as a defense to a paternity action brought by the child's mother. In *H.W.K.*, the mother was married to another man at the time the child was conceived, but was estranged from him and living with H.W.K. Additionally, there was testimony that H.W.K. had admitted being the child's father. The trial court held that H.W.K. was the father.¹³³ H.W.K. appealed, arguing that the evidence presented by the mother was insufficient to rebut the presumption.

The court of appeals affirmed the trial court's determination that H.W.K. was the father of the child, despite Indiana case law, which has held that statements and admissions of the parties, alone, are insufficient to rebut the presumption of legitimacy.¹³⁴ The court held that this principle from case law was "factually limited to situations where there is evidence the husband had access to the mother during the period of conception."¹³⁵ In this case, the court of appeals found that the mother's evidence was sufficient to show that the husband had not had access to her during the crucial period of time.¹³⁶ Because the type of evidence presented avoided the application of the principle that the parties' statements alone are insufficient evidence, the

¹²⁹*Id.* (footnote omitted). Justice O'Connor found a countervailing state interest in keeping the mothers and children off the welfare rolls. *Id.* at 1556-57 (O'Connor, J., concurring). Justice O'Connor also found that there was nothing "special about the first year following birth that compels the decision in this case." *Id.* at 1558. Justice O'Connor did not "read the Court's decision as prejudging the constitutionality of longer periods of limitation" *Id.*

¹³⁰*H.W.K. v. M.A.G.*, 426 N.E.2d 129, 131 (Ind. Ct. App. 1981) (citing *R.D.S. v. S.L.S.*, 402 N.E.2d 30 (Ind. Ct. App. 1980)). See also *Buchanan v. Buchanan*, 256 Ind. 119, 123, 267 N.E.2d 155, 157 (1971); *Hooley v. Hooley*, 141 Ind. App. 101, 226 N.E.2d 344 (1967); *Whitman v. Whitman*, 140 Ind. App. 289, 215 N.E.2d 689 (1966).

¹³¹426 N.E.2d at 131.

¹³²426 N.E.2d 129 (Ind. Ct. App. 1981).

¹³³*Id.* at 131.

¹³⁴See *L.F.R. v. R.A.R.*, 269 Ind. 97, 378 N.E.2d 855 (1978); *Buchanan v. Buchanan*, 256 Ind. 119, 267 N.E.2d 155 (1971).

¹³⁵426 N.E.2d at 132.

¹³⁶*Id.* at 132-33.

court held that the mother had met her burden of proof.¹³⁷

In another case, *In re G.L.A.*,¹³⁸ the court of appeals reversed the trial court's order that three children involved in a paternity action change their surnames and take their father's surname. The mother appealed the order of the trial court, alleging that there was insufficient evidence in the record on the issue whether a change of the children's surname was in their best interests.¹³⁹ The court of appeals stated that the proper standard is whether the change is in the best interest of the child.¹⁴⁰ In addition, the majority opinion reasoned that because the child of an unwed mother bears the mother's name at birth, any party wishing to change the name has the burden of persuasion on the issue.¹⁴¹ Thus, the court of appeals found that the trial court "indulged in an erroneous presumption that, absent extreme circumstances, a child should share the surname of its biological father as long as the father is contributing to its support."¹⁴² Because the father had introduced evidence relevant only to issues of establishing paternity, custody, support and visitation, but no evidence relevant to the issue of changing the children's names, the court of appeals reversed the trial court's decision.

The dissenting judge found that the father's agreement to support the children and to provide medical insurance, and his "desire" for the children to have his surname were sufficient evidence to uphold the trial court's decision.¹⁴³

¹³⁷*Id.* at 132.

¹³⁸430 N.E.2d 433 (Ind. Ct. App. 1982).

¹³⁹*Id.* at 433.

¹⁴⁰*Id.* The majority gave the following examples of evidence that would be relevant to the issue of the child's best interest:

[E]vidence of the surname by which the child is known by "family" and the community; the convenience, if any, of retaining or assuming the surname of its custodial parent; the existence of property owned by the child under a particular surname, such as a U.S. savings bond; the identification of the child by a particular surname with private or public entities, such as insurance carriers and Social Security Administration; the degree of confusion to the child engendered by a change in surname; and, if a child is of sufficient maturity, the child's desire as to its surname.

Id. at 434 n.3.

¹⁴¹430 N.E.2d at 434.

¹⁴²*Id.*

¹⁴³*Id.* at 435 (Buchanan, C.J., dissenting). "Given such commendable expressions of paternalism on the father's part, the trial court's action is understandable—and supportable." *Id.*

VIII. Evidence

HENRY C. KARLSON*

A. Hearsay

1. Patterson Unlimited.—In *Dowdell v. State*,¹ the fourth district court of appeals ignored a limitation upon the substantive use of out-of-court statements that the third district court of appeals had created in *Carter v. State*.² In the landmark opinion *Patterson v. State*,³ the Indiana Supreme Court had held that an extrajudicial statement may be used as substantive evidence if the declarant is available for cross-examination.⁴ Then, construing *Patterson*, the third district court of appeals in *Carter* created foundational requirements for the substantive use of extrajudicial statements permitted by *Patterson*. In *Carter*, the court required that the declarant be confronted with the statement while on the witness stand and admit or deny making the statement.⁵ Neither of these foundational requirements were honored in *Dowdell*.

The defendant in *Dowdell* was convicted of theft. The only evidence indicating that the property in question was not the property of the

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¹429 N.E.2d 1 (Ind. Ct. App. 1981).

²412 N.E.2d 825 (Ind. Ct. App. 1980). For further discussion of this case, see Carlson, *Evidence, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 227, 227-30 (1982).

³263 Ind. 55, 324 N.E.2d 482 (1975).

⁴*Id.* at 58, 324 N.E.2d at 484-85. In *Patterson*, the court made reference to the revised federal rules, effective July 1, 1975. FED. R. EVID. 801(d), in part, provides:

Statements which are not hearsay. A statement is not hearsay if—

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive

Id. The *Patterson* court, however, went beyond the federal rule and held that if the declarant is available for cross-examination, then his out-of-court statement is not hearsay, even if the statement is not made while the declarant is subject to the penalty of perjury and is consistent with the declarant's present testimony. 263 Ind. at 58, 324 N.E.2d at 485. Unlike the federal rule, the rule announced in *Patterson* permits the general use of out-of-court statements which are consistent with the declarant's in-court testimony. *Id.*, 324 N.E.2d at 484-85. *But see Samuels v. State*, 267 Ind. 676, 679, 372 N.E.2d 1186, 1187 (1978); *Stone v. State*, 268 Ind. 672, 678, 377 N.E.2d 1372, 1375 (1978); *Smith v. State*, 400 N.E.2d 1137, 1141 (Ind. Ct. App. 1980).

⁵412 N.E.2d 825, 828-29. An oral statement may be used as substantive evidence, the *Carter* court held, only if the declarant admits making the statement. *Id.* at 829-30, 831 n.4. A written statement or an oral statement that was electronically recorded may be used as substantive evidence even though the declarant denies or fails to remember making it. *Id.* at 831 n.4.

defendant consisted of testimony from a police officer that a William Coleman had identified the property as his own property, which was missing from his home.⁶ Although present in the courtroom, Coleman did not take the witness stand. Despite Coleman's failure to testify, the court in *Dowdell* found that Coleman's presence in the courtroom made him available for cross-examination. Therefore, the court held that Coleman's out-of-court statements were "admissible hearsay under the rule of *Patterson v. State*."⁷ Assuming that a proper objection to the police officer's testimony was made, the *Dowdell* court's ruling on the admissibility of such evidence is incorrect.

An examination of cases wherein the *Patterson* rule has been relied upon discloses a common factor. In each case, although the declarant was not always confronted with the out-of-court statement prior to its admission, the declarant did testify and, thus, could actually be cross-examined.⁸ Although the Indiana Supreme Court has not required that a declarant testify before his extrajudicial statement is received into evidence, the court has warned that such statements are not to be used "as a mere substitute for available in-court testimony."⁹ Because the declarant in *Dowdell* was available and could have been called as a witness, his extrajudicial statement to the police officer was clearly used in place of available in-court testimony.

An expansion of *Patterson* to permit substantive use of an extrajudicial statement made by a declarant who, while available to be called as a witness, never in fact takes the witness stand serves no valid purpose. Live testimony is always preferred over mere recorded testimony. An example of this preference is the requirement that, before testimony from a prior proceeding is admissible in court under the former testimony exception to the hearsay rule, the declarant must be shown to be unavailable as a witness.¹⁰ If a witness is available

⁶429 N.E.2d at 3.

⁷*Id.* at 3 n.4. It must be noted that the court is incorrect in referring to the evidence as "admissible hearsay." Under the rule announced in *Patterson*, the evidence is *not* hearsay. *Patterson v. State*, 263 Ind. 55, 58, 324 N.E.2d 482, 484-85 (1975).

⁸See, e.g., *Rapier v. State*, 435 N.E.2d 31 (Ind. 1982); *Lowery v. State*, 434 N.E.2d 868 (Ind. 1982); *Bundy v. State*, 427 N.E.2d 1077 (Ind. 1981); *Riddle v. State*, 402 N.E.2d 958 (Ind. 1980); *Brown v. State*, 390 N.E.2d 1000 (Ind. 1979); *Gutierrez v. State*, 386 N.E.2d 1207 (Ind. 1979); *Thompkins v. State*, 383 N.E.2d 347 (Ind. 1978); *Buttram v. State*, 269 Ind. 598, 382 N.E.2d 166 (1978); *Lamar v. State*, 266 Ind. 689, 366 N.E.2d 652 (1977); *Flewallen v. State*, 267 Ind. 90, 368 N.E.2d 239 (1977); *Carter v. State*, 266 Ind. 196, 361 N.E.2d 1208, *cert. denied*, 434 U.S. 866 (1977); *Barrientos v. State*, 173 Ind. App. 652, 365 N.E.2d 789 (1977); *Lloyd v. State*, 166 Ind. App. 248, 335 N.E.2d 232, *trans. denied* (1976). An excellent discussion of this aspect of the *Patterson* rule is found in *D.H. v. J.H.*, 418 N.E.2d 286 (Ind. Ct. App. 1981).

⁹*Samuels v. State*, 267 Ind. 676, 679, 372 N.E.2d 1186, 1187 (1978).

¹⁰See *Burnett v. State*, 162 Ind. App. 543, 319 N.E.2d 878 (1974); FED. R. EVID. 804(b)(1). Professor Seidman in his work on Indiana evidence states: "Since there is

to testify, he should be called to the witness stand to enable the trier of fact to observe the declarant's demeanor while testifying to the disputed facts. Only if the out-of-court statement offered under the *Patterson* rule adds evidentiary information that is not contained in the witness' live testimony, can it be said that the extrajudicial statement is not being used in place of readily available in-court testimony. The *Dowdell* court's attempt to extend *Patterson* by permitting the use of extrajudicial statements made by individuals who never take the witness stand should be rejected by the Indiana Supreme Court.

2. *Statement as Cumulative Evidence.*—The policy that an out-of-court statement is not to be used in place of readily available in-court testimony does not forbid the use of a *Patterson* statement which is in addition to in-court testimony by the declarant. In *Underhill v. State*,¹¹ the prosecution offered, and the court received, a written report by William Cross. The report, which consisted of a narrative of the events in question, was contained in a one-page, handwritten, unsigned document. On appeal, the defendant alleged that the admission of the report was error because it was not signed and because part of it was prepared by a deputy prosecutor.

In holding that the trial court did not err in receiving the written statement as evidence, the supreme court recognized that a statement, to be admissible under the rule announced in *Patterson*, need not be signed.¹² Indeed oral, as well as written, statements are admissible under *Patterson*.¹³

In explaining its decision, the court also stated: "Furthermore, the matters contained in the report merely reiterated the testimony which Cross gave at trial."¹⁴ If this is true, then the statement should have been excluded. Repeating a witness' testimony gives it undue emphasis. Because it would be improper to permit a witness to repeat his testimony over proper objection on direct examination,¹⁵ it should be equally improper to permit the use of prior out-of-court statements for that purpose. If a proper objection is made to a prior statement

a strong policy favoring the personal presence of the witness for demeanor evaluation, in order for his former testimony to be received, it is necessary to demonstrate to the trial judge the unavailability of the witness" M. SEIDMAN, THE LAW OF EVIDENCE IN INDIANA 116 (1977). See also *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Barber v. Page*, 390 U.S. 719 (1968).

¹¹428 N.E.2d 759 (Ind. 1981).

¹²*Id.* at 765.

¹³*Patterson v. State*, 263 Ind. 55, 324 N.E.2d 482 (1975). See *Bundy v. State*, 427 N.E.2d 1077 (Ind. 1981); *Brown v. State*, 390 N.E.2d 1000 (Ind. 1979).

¹⁴428 N.E.2d at 765-66.

¹⁵E. BROWNLEE, OBJECTIONS TO EVIDENCE § 2.3 (1974). "Many times the same question will be asked of a witness after it has been asked and answered . . . The general rule is not to permit such questioning because repetition may give excessive emphasis to selected evidence." *Id.*

of a witness, the extrajudicial statement should be excluded unless the court holds that the statement does more than merely repeat the in-court testimony of the witness.

3. *Judgment of Previous Conviction.*—A new Indiana statute¹⁶ terminates Indiana's adherence to the common law rule that excludes evidence of a criminal conviction when it is offered in a civil proceeding as evidence of a material fact upon which the conviction is based.¹⁷ The statute permits evidence of certain types of criminal convictions to be admissible in a civil action as evidence of "any fact essential to sustaining the judgment," but evidence of an acquittal remains inadmissible.¹⁸ For a conviction to be admissible, it must be entered after a plea of guilty or after a full trial of the issues, and the conviction must be for an offense "punishable by death or imprisonment in excess of one [1] year."¹⁹ Such a conviction may be used as evidence of a material fact upon which the conviction is based in a civil action against a party who was not involved in the criminal prosecution.²⁰ Admission of the conviction is justified by the reliability of the fact-finding process in criminal proceedings and by the requirement of proof beyond a reasonable doubt.²¹

Enactment of this provision brings Indiana law, as it relates to the use of a conviction in a civil action, in accord with federal law.²² Unlike Federal Rule of Evidence 803(22),²³ however, the Indiana statute

¹⁶Act of Feb. 25, 1982, Pub. L. No. 201, 1982 Ind. Acts 1514 (codified at IND. CODE § 34-3-18-1 (1982)). The new statute provides:

Evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one [1] year, shall be admissible in any civil action to prove any fact essential to sustaining the judgment, and is not excluded from admission as hearsay regardless of whether the declarant is available as a witness. The pendency of an appeal may be shown but does not affect the admissibility of evidence under this section.

Id.

¹⁷IND. CODE § 34-3-18-1 (1982). See *Hambe v. Hill*, 148 Ind. App. 662, 269 N.E.2d 394 (1971); *Beene v. Gibraltar Indus. Life Ins. Co.*, 116 Ind. App. 290, 63 N.E.2d 299 (1945); see also *Wheelock v. Eyl*, 393 Mich. 74, 223 N.W.2d 276 (1974); *Rullo v. Rullo*, 121 N.H. 299, 428 A.2d 1245 (1981). But see *Karlson, Criminal Judgments as Proof of Civil Liability*, 31 DEF. L.J. 173 (1982); Note, *Admissibility and Weight of a Criminal Conviction in a Subsequent Civil Action*, 39 VA. L. REV. 995 (1953).

¹⁸IND. CODE § 34-3-18-1 (1982).

¹⁹*Id.*

²⁰See *id.*

²¹See 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(22)[01], at 803-73 (1981); 4 D. LOISELL & C. MUELLER, FEDERAL EVIDENCE § 470, at 887-88 (1980).

²²See FED. R. EVID. 803(22).

²³FED. R. EVID. 803(22), as an exception to the hearsay rule, provides:

Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any

does not permit a prior conviction to be used in a criminal proceeding as evidence of a material fact upon which the conviction is based.²⁴

One possible application of the new Indiana provision, however, should be rejected. A plea of guilty by an accused party is an admission that has traditionally been considered admissible against the accused in a subsequent civil proceeding.²⁵ By definition, an admission is proper evidence only when offered against the party making it.²⁶ However, Indiana's new statute would permit a convicted party to offer his own plea of guilty, embodied in a judgement of conviction, as evidence.²⁷ For example, the beneficiary of a life insurance policy could offer as evidence his conviction for reckless homicide to show that he is entitled to receive the proceeds of the policy, which are prohibited when the beneficiary intentionally kills the insured.

Thus, in light of the potential misuse, a conviction based upon a plea of guilty should be held inadmissible when tendered by the convicted party. Furthermore, because a guilty plea removes the necessity for offering evidence at the criminal proceeding, the reliability of the fact-finding process and the requirement of proof beyond a reasonable doubt, upon which the admission of a conviction is premised, do not exist. All that exists is a self-serving statement on the part of the convicted party.²⁸

4. *Statements of a Co-conspirator.*—In *Wallace v. State*,²⁹ the Indiana Supreme Court upheld the evidentiary use of statements made by a co-conspirator after the offense that was the object of the conspiracy had been committed. At the defendant's trial, a witness linked the defendant to the murder of her husband by relating several statements made by the defendant to a co-conspirator who did not testify. Some of these statements were made after the murder in question had been completed. If the conspiracy ended with the murder,

fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

²⁴See *supra* note 16.

²⁵See, e.g., *Hambey v. Hill*, 148 Ind. App. 662, 269 N.E.2d 394 (1971); *Hudson v. Otero*, 80 N.M. 668, 459 P.2d 830 (1969) (dicta).

²⁶See *Jethroe v. State*, 262 Ind. 505, 319 N.E.2d 133 (1974); *Marsh v. Lesh*, 164 Ind. App. 67, 326 N.E.2d 626 (1975); FED. R. EVID. 801(d)(2). See generally C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 262, at 628 (2d ed. 1972) ("Admissions are the words or acts of a party-opponent, or his predecessor or representative, offered as evidence against him.").

²⁷See *supra* note 16.

²⁸Cf. *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977) (negligent homicide conviction based on a plea of guilty not conclusive on issue of whether killing was committed with intent when offered by convicted party).

²⁹426 N.E.2d 34 (Ind. 1981) (reversed and remanded on other grounds).

as some prior cases indicate, then statements made by a co-conspirator after that point are not admissible.³⁰

In determining that the statements were properly received, the court in *Wallace* held that a conspiracy and its objectives do not necessarily end upon the successful commission of the underlying offense.³¹ For purposes of the rule permitting the statements of one conspirator made in furtherance of the conspiracy to be admissible against all co-conspirators, the conspiracy does not end until all the objectives of the conspiracy are achieved.³² In *Wallace*, one objective of the conspiracy was for the actual killers to be paid by the defendant from the proceeds of the deceased's life insurance policy.³³ Statements made concerning this payment were made in furtherance of the conspiracy's objectives and, therefore, were admissible even though the statements were made after the murder had taken place.³⁴

This aspect of the *Wallace* opinion is correct and in accord with federal case law.³⁵ In light of *Wallace*, however, the admissibility of a statement under the co-conspirator exception to the hearsay rule will, in some cases, turn upon how the objectives of the conspiracy are described to the court. If the objectives are not described as extending beyond the commission of the underlying offense, then statements made after that point would be inadmissible. Artful counsel, however, who describe the ends of the conspiracy in broader terms may be able to greatly expand the evidentiary use of statements made by co-conspirators.

B. Character Evidence

Two recent opinions, one from the Indiana Supreme Court and

³⁰See *Mar Jason v. State*, 225 Ind. 652, 75 N.E.2d 904 (1947); *Kahn v. State*, 182 Ind. 1, 105 N.E. 385 (1914); *Walls v. State*, 125 Ind. 400, 25 N.E. 457 (1890); *Berridge v. State*, 168 Ind. App. 22, 340 N.E.2d 816 (1976).

³¹426 N.E.2d at 43 (citing *Hicks v. State*, 213 Ind. 277, 11 N.E.2d 171 (1937), *cert. denied*, 304 U.S. 564 (1938)) (the disposition of the body in a murder conspiracy was in furtherance of the conspiracy).

³²426 N.E.2d at 43. Indiana appears to follow the traditional view that the statement by the co-conspirator must have been made in furtherance of the conspiracy's objectives. See *Patton v. State*, 241 Ind. 645, 175 N.E.2d 11 (1961); *Hicks v. State*, 213 Ind. 277, 11 N.E.2d 171, *cert. denied*, 304 U.S. 564 (1938). See FED. R. EVID. 801(d)(2)(E) for the general rule. The Model Code of Evidence does not include this requirement. See MODEL CODE OF EVIDENCE RULE 508 (1942).

³³426 N.E.2d at 43.

³⁴*Id.*

³⁵See, e.g., *United States v. Fortes*, 619 F.2d 108, 117 (1st Cir. 1980); *United States v. Schwanke*, 598 F.2d 575, 581-82 (10th Cir. 1979); *United States v. Hickey*, 596 F.2d 1082, 1089-90 (1st Cir.), *cert. denied*, 444 U.S. 853 (1979); *United States v. Knuckles*, 581 F.2d 305, 313 (2d Cir.), *cert. denied*, 439 U.S. 986 (1978); cf. *McDonald v. United States*, 89 F.2d 128, 133-34 (8th Cir. 1937) (defendant held liable as co-conspirator even though he entered the conspiracy months after the substantive offense was committed).

one from the Indiana Court of Appeals, illustrate two different uses for evidence of a common scheme or plan in a criminal proceeding, and the different foundation needed for each use. In *Downer v. State*,³⁶ the supreme court correctly held that evidence, which showed an informant had been purchasing drugs from the defendant since 1975, was admissible in the prosecution for a 1980 drug sale. The evidence was admissible to prove the existence of a common scheme or plan to sell narcotics.³⁷ *Downer* should be contrasted with the decision of the court of appeals in *Byrer v. State*.³⁸

The defendant in *Byrer* was charged with robbery while armed with a deadly weapon. The trial judge allowed the prosecution to offer evidence showing that when the defendant was apprehended two days after the robbery in question, he was planning another robbery. On appeal, the court held that this evidence was not admissible to prove a common scheme or plan on the defendant's part.³⁹ In order to be admissible as evidence of a common scheme or plan, the appellate court held that "the similarities between offenses or acts of misconduct must be so unusual and distinctive so as to be 'like a signature.'"⁴⁰

It is a well settled rule of evidence that uncharged acts of misconduct may not be used to prove a defendant is a bad person and, therefore, probably guilty of the offense under consideration.⁴¹ However, there are numerous other purposes for which the evidence may be offered.⁴² One purpose is to demonstrate a common scheme or plan on the part of the accused.⁴³ If the common scheme or plan is to be used as circumstantial evidence to identify the accused as the person who committed the crime under consideration, the similarities between the acts of misconduct must be so distinctive as to give rise to a reasonable belief that the defendant committed both

³⁶429 N.E.2d 953 (Ind. 1982).

³⁷*Id.* at 955.

³⁸423 N.E.2d 704 (Ind. Ct. App. 1981).

³⁹*Id.* at 708-09.

⁴⁰*Id.* at 708 (quoting *Williams v. State*, 417 N.E.2d 328, 332 (Ind. 1981)).

⁴¹See *Biggerstaff v. State*, 266 Ind. 148, 361 N.E.2d 895 (1977); *Schnee v. State*, 254 Ind. 661, 262 N.E.2d 186 (1970). See also FED. R. EVID. 404. But see *Fox v. State*, 413 N.E.2d 665 (Ind. Ct. App. 1980) (evidence of depraved sexual conduct admissible); *Omans v. State*, 412 N.E.2d 305 (Ind. Ct. App. 1980) (acts tending to indicate a depraved sexual instinct are admissible).

⁴²See, e.g., *Henderson v. State*, 403 N.E.2d 1088, 1090 (Ind. 1980) (identity); *Quinn v. State*, 265 Ind. 545, 546-47, 356 N.E.2d 1186, 1187 (1976) (motive); *Franks v. State*, 262 Ind. 649, 657, 323 N.E.2d 221, 226 (1975) (intent); *Bennett v. State*, 416 N.E.2d 1307, 1311 (Ind. Ct. App. 1981) (res gestae); *Samuels v. State*, 159 Ind. App. 657, 660-61, 308 N.E.2d 879, 881-82 (1974) (knowledge).

⁴³*Manuel v. State*, 267 Ind. 436, 438, 370 N.E.2d 904 (1977); *Perry v. State*, 393 N.E.2d 204, 207 (Ind. Ct. App. 1979); *Ingle v. State*, 176 Ind. App. 695, 707, 377 N.E.2d 885, 892 (1978).

acts. More is needed than merely demonstrating the repeated commission of a crime of the same class, such as repeated murders or assaults.⁴⁴

Common scheme or plan evidence may, however, be used to show that the crime in question was part of a larger plan or a continuing scheme of criminal conduct.⁴⁵ When it is used for this purpose, there is no need to prove that the uncharged acts and the crime under consideration are uniquely similar. The only foundational requirement is that the evidence be sufficient to give rise to a reasonable belief that the offense under consideration was not an isolated event, but that it was part of a larger plan or part of a continuing course of criminal conduct.⁴⁶

Because the court in *Downer* did not require that the evidence of prior drug sales, which was offered to prove a common scheme or plan, be similar to the sale charged, *Downer* and *Byrer* appear to conflict. However, the two opinions are not in disagreement. The evidence in *Downer* was used to show a continuing plan or scheme on the part of the defendant to deal in drugs; his identity was not in issue.⁴⁷ Prior Indiana decisions have recognized that a drug sale is often part of a larger scheme or plan to peddle drugs.⁴⁸ In *Byrer*, however, evidence of the accused's arrest while planning another robbery did not show the existence of a larger, ongoing plan or scheme to commit robbery. Rather, the evidence was offered to prove the identity of the defendant. Therefore, in order for the evidence to be admissible in *Byrer*, the circumstances surrounding the two offenses would have to identify the accused as the person who committed the robbery in question. The court of appeals was correct in holding that, to be admissible for

⁴⁴McCORMICK, *supra* note 26, § 190, at 448-49. Indiana opinions appear to combine two exceptions within the common scheme or plan exception; one use is to show the crime in question is part of a larger plan. See *Perry v. State*, 393 N.E.2d 204, 207 (Ind. Ct. App. 1979). Another use is to show the identity of the accused by the similarity between the two crimes. See *Biggerstaff v. State*, 266 Ind. 148, 152, 361 N.E.2d 895, 897 (1977). When used for this purpose it should be referred to as modus operandi. See *United States v. Oliphant*, 525 F.2d 505, 507 (9th Cir. 1975), cert. denied, 424 U.S. 972 (1976); *United States v. McCord*, 509 F.2d 891, 895 (7th Cir.), cert. denied, 423 U.S. 833 (1975); *United States v. Castro*, 476 F.2d 750, 753 (9th Cir. 1973); *Riddle v. State*, 264 Ind. 587, 598, 348 N.E.2d 635, 641 (1976).

⁴⁵See, e.g., *Carbo v. United States*, 314 F.2d 718 (9th Cir.), cert. denied, 377 U.S. 953 (1963).

⁴⁶See *United States v. Freeman*, 514 F.2d 1184 (10th Cir. 1975); *Perry v. State*, 393 N.E.2d 204 (Ind. Ct. App. 1979).

⁴⁷429 N.E.2d at 955. Although the opinion is not at all clear, it appears the evidence of common scheme or plan was used as circumstantial evidence that the sale in question had taken place. *Id.*

⁴⁸See, e.g., *Ingle v. State*, 176 Ind. App. 695, 377 N.E.2d 885 (1978); *Miller v. State*, 167 Ind. App. 271, 338 N.E.2d 733 (1975).

identification, the two acts of misconduct must be unusual and distinctive in nature.⁴⁹

C. Evidence of Business Custom

Business custom as proof of the mailing of important documents is the subject of the court's decision in *F & F Construction Co. v. Royal Globe Insurance Co.*⁵⁰ The plaintiff brought suit against its liability insurer alleging that the insurer had breached its contractual duty to defend the plaintiff. The trial court granted summary judgment for the defendant because the facts, as shown by the affidavits, depositions, and pleadings, were inadequate as a matter of law to permit a finding that the plaintiff had complied with the notice provisions of the insurance contract.⁵¹

The facts showed that the president of F & F had placed the papers relating to the suit on the desk of his office manager with orders that the documents be mailed. Normal office procedure provided for the office manager to give the papers to another employee for mailing. The office manager, and other employees, could not recall seeing the documents or mailing them. The court also found that the defendant, Royal Globe, never received the papers;⁵² however, it is not clear on what evidence the court based this finding of fact.

On appeal, the main issue in *F & F Construction Co.* was whether the pleadings presented a factual issue, which would make the summary judgment contrary to law.⁵³ The appellate court, relying upon *United Farm Bureau Mutual Insurance Co. v. Adams*,⁵⁴ ruled that summary judgment was appropriate because "[n]ormal office procedure in preparing and dispatching outgoing mail is not sufficient to prove mailing, instead . . . testimony from one with direct and actual knowledge of the particular message in question is required to establish proof of mailing."⁵⁵ This holding is both bad law and a misapplication of *United Farm Bureau*.

⁴⁹423 N.E.2d at 708. See *Riddle v. State*, 264 Ind. 587, 348 N.E.2d 635 (1976); *Layton v. State*, 248 Ind. 52, 221 N.E.2d 881 (1966); *Smith v. State*, 215 Ind. 629, 21 N.E.2d 709 (1939).

⁵⁰423 N.E.2d 654 (Ind. Ct. App. 1981). For a full discussion of the case, see Trimble, *Insurance, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 205, 214 (1983).

⁵¹423 N.E.2d at 655.

⁵²*Id.*

⁵³Summary judgment is appropriate only if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." IND. R. TR. P. 56(C).

⁵⁴145 Ind. App. 516, 251 N.E.2d 696 (1969).

⁵⁵423 N.E.2d at 656 (citing *United Farm Bureau Mut. Ins. Co. v. Adams*, 145 Ind. App. 516, 251 N.E.2d 696 (1969)).

The issue before the court in *United Farm Bureau* was not whether business custom was sufficient evidence of mailing to present a question of fact, but whether, as a matter of law, business custom established mailing *in light of conflicting evidence*.⁵⁶ To hold, as a matter of law, that business custom does not establish mailing when other evidence is in conflict is not to hold, as a matter of law, that business custom is insufficient to prove mailing. Reliance upon the opinion in *United Farm Bureau* by the court in *F & F Construction Co.* was clearly improper.

In addition to the misapplication of *United Farm Bureau*, the court's holding also brings Indiana evidence law into conflict with the Federal Rules of Evidence. Federal Rule of Evidence 406 provides that: "[E]vidence of . . . the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the . . . organization on a particular occasion was in conformity with the habit or routine practice."⁵⁷ The trend in the federal courts is to permit mailing to be proven by business routine and to not require the mail clerk to testify about the mailing of the particular objects in question.⁵⁸ Given the large number of documents mailed by a business organization in the normal course of business, it is unreasonable to demand that the mailing of each piece of mail be separately remembered or that a business record be made of its mailing.⁵⁹ The standard of proof imposed by the court in *F & F Construction Co.* is unrealistic and is not in accord with modern practices.

D. Judicial Notice

In denying the defendants' appeal in *Freson v. Combs*,⁶⁰ the court of appeals limited the use of judicial notice by Indiana courts. During

⁵⁶145 Ind. App. at 519, 251 N.E.2d at 698 ("The main issue before this court is whether the evidence that Appellant mailed the notice of cancellation is undisputed, without conflict and can lead only to the conclusion that Appellants did in fact mail the notice.").

⁵⁷FED. R. EVID. 406.

⁵⁸See *United States v. Joyce*, 499 F.2d 9, 15-16 (7th Cir.), cert. denied, 419 U.S. 1031 (1974); *United States v. Fassoulis*, 445 F.2d 13, 17 (2d Cir.), cert. denied, 404 U.S. 858 (1971); *Webb v. United States*, 347 F.2d 363, 364 (10th Cir. 1965); *Whiteside v. United States*, 346 F.2d 500, 504 (8th Cir. 1965), cert. denied, 384 U.S. 1023 (1966). *Contra United States v. Wolfson*, 322 F. Supp. 798, 813-14 (D. Del. 1971), aff'd on other grounds, 454 F.2d 60 (3d Cir.), cert. denied, 406 U.S. 924 (1972); Annot., 86 A.L.R. 541 (1933); Annot., 25 A.L.R. 9 (1923).

⁵⁹*United States v. Matzker*, 473 F.2d 408, 411 (8th Cir. 1973).

⁶⁰433 N.E.2d 55 (Ind. Ct. App. 1982). For a discussion of the case, see Krieger, *Property, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 283, 285 n.4 (1983).

a quiet title action, the defendants requested that the court take judicial notice of a related suit and its proceedings. The request was made after each side had rested their case. In holding that the trial court's refusal to grant the request was not error, the court of appeals ruled that a trial court may not take judicial notice of its own record in a related cause of action.⁶¹ In addition, the appellate court found that the trial court properly exercised its discretion by holding that a request for judicial notice should have been made before the requesting party rested its case.⁶² Both of these rulings are in conflict with the use of judicial notice in federal courts⁶³ and are unnecessary restraints upon the use of judicial notice.

The doctrine of judicial notice provides an alternative to the formal presentation of evidence.⁶⁴ When judicial notice is taken of a fact, the parties need not present evidence to establish that fact, and the trial judge informs the jury of its existence.⁶⁵ Because judicial notice is a substitute for the usual presentation of evidence, a court is not bound by the normal rules of evidence in determining the existence of a fact that is to be judicially noticed.⁶⁶ Federal Rule of Evidence 201(f) permits judicial notice to be taken at any stage in the proceeding.⁶⁷ Furthermore, on its face, Federal Rule of Evidence 201(d) requires that judicial notice be taken if a proper request is made.⁶⁸ Indiana law similarly recognizes that judicial notice may be taken for

⁶¹433 N.E.2d at 59.

⁶²*Id.* at 60.

⁶³See FED. R. EVID. 201.

⁶⁴S. SALZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL, 43-44 (3d ed. 1982).

Both at common law and in the evidentiary system envisioned by the Federal Rules, most proof is presented by means of testimonial evidence or by the offering of demonstrative evidence. But there has traditionally been an exception to the requirement that a party who relies upon a certain proposition must prove it; the exception is judicial notice.

Id.

⁶⁵FED. R. EVID. 201(g).

⁶⁶See 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE, § 58, at 449-51 (1977); see also United States v. 1078.27 Acres of Land, 446 F.2d 1030, 1034 (5th Cir. 1971), cert. denied, *sub nom.* Galveston City Co. v. United States, 405 U.S. 936 (1972) (judge did independent research into historical facts).

⁶⁷FED. R. EVID. 201(f); see Mills v. Denver Tramway Corp., 155 F.2d 808 (10th Cir. 1946). But see United States v. Jones, 580 F.2d 219 (6th Cir. 1978) (judicial notice of an adjudicative fact may not be taken for the first time on appeal in a criminal prosecution). For a discussion on what constitutes an adjudicative fact, see Annot., 35 A.L.R. FED. 440 (1977).

⁶⁸FED. R. EVID. 201(d). FED. R. EVID. 201(f) read with FED. R. EVID. 201(d) would appear to require that judicial notice be taken on appeal, if the court is supplied with the necessary information. However, such an interpretation has been characterized as "unwise" and in conflict with the policy embodied in FED. R. EVID. 103. 1 D. LOUISELL & C. MUELLER, *supra* note 66, § 59, at 482.

the first time on appeal.⁶⁹ Thus, because judicial notice may be taken on appeal, there is no reason to require that a request for judicial notice be made before the party who desires it rests in the trial court.⁷⁰

Indiana law conflicts on the question of whether a court should be permitted to take judicial notice of its own records in a related suit. *Fletcher Savings & Trust Co. v. American State Bank of Lawrenceburg*,⁷¹ cited in *Freson*,⁷² requires that the record of proceedings from another suit be formally introduced into evidence before the trial court may consider it. However, other opinions permit an appellate court to take judicial notice of its own records in a related case.⁷³

Making the introduction of formal proof of the proceedings in a related suit a precondition for the same court's consideration of those proceedings is inconsistent with one of the two theories upon which judicial notice may be based. Modern law, illustrated by Federal Rule of Evidence 201(b), recognizes two grounds for judicial notice.⁷⁴ Judicial notice is appropriate if the fact is one that is generally known within the territorial jurisdiction of the court⁷⁵ or that is capable of accurate and ready determination by reference to sources of indisputable accuracy.⁷⁶ Although the proceedings before the same court in a related

⁶⁹See *Roeschlein v. Thomas*, 258 Ind. 16, 280 N.E.2d 581 (1972); *In re Holovachka*, 245 Ind. 483, 198 N.E.2d 381 (1964), cert. denied, 379 U.S. 974; *Bromley v. City of Indianapolis*, 119 Ind. App. 184, 85 N.E.2d 93 (1949).

⁷⁰A court in Indiana has discretion in deciding whether to take judicial notice of a fact, "for even though the court may, it is not bound, to take judicial notice of all matters of fact of which it may take notice." *Fletcher Savings & Trust Co. v. American State Bank of Lawrenceburg*, 196 Ind. 118, 134-35, 147 N.E. 524, 530 (1925). In this aspect, Indiana law differs from FED. R. EVID. 201(d) which requires judicial notice be taken if a proper request is made. In deciding whether to exercise its discretion, a court may consider whether a timely request has been made. Lack of a timely request, however, should not be a bar to determining if there has been an abuse of discretion by a court's refusal to take judicial notice. Cf. 1 D. LOISELL & C. MUELLER, *supra* note 66, § 59, at 482-92.

⁷¹196 Ind. 118, 147 N.E. 524 (1925).

⁷²433 N.E.2d at 59.

⁷³See *Chandler v. State*, 261 Ind. 161, 300 N.E.2d 877 (1973); *State ex rel. Indiana State Bar Ass'n v. Moritz*, 244 Ind. 156, 191 N.E.2d 21 (1963); *Robbins v. State*, 197 Ind. 304, 149 N.E. 726 (1925).

⁷⁴FED. R. EVID. 201(b) provides: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." See C. MCCORMICK, *supra* note 26, §§ 329-30, at 760-66.

⁷⁵See *School City of Gary v. State ex rel. Gary Artists' League, Inc.*, 253 Ind. 697, 256 N.E.2d 909 (1970) (judicial notice of assessed property valuation proper); *Belcher v. Buesking*, 371 N.E.2d 417 (Ind. Ct. App. 1978) (judge in bench trial involving auto accident may draw upon his experience as a driver).

⁷⁶See *Lippeatt v. Comet Coal and Clay Co.*, 419 N.E.2d 1332 (Ind. Ct. App. 1981) (judicial notice of public documents and statistics compiled by state geologists).

suit are not a matter generally known within the territorial jurisdiction of the court, the proceedings are clearly capable of ready and accurate determination by resort to the court's own records. To require that formal proof be made of matters so easily proven from indisputable sources is a waste of a court's time. Federal courts recognize this fact and take judicial notice of their own records.⁷⁷ Indiana courts also should be permitted to do so.

E. Cross-Examination

In *Razo v. State*,⁷⁸ two men who were convicted of rape challenged the propriety of the trial court's limitation on their cross-examination of the prosecutrix. During cross-examination, the prosecutrix testified that at the time of the rape she was in the process of enrolling in school. Counsel for the appellants then asked if she was just getting out of the Indiana Girls School about the time of the rape. The trial court sustained an objection to this question, and the appellate court found the trial court's ruling to be a proper exercise of its discretion. The appellate court's decision was correct because the question did not seek information that was relevant to any issue before the court or that was inconsistent with the prosecutrix's testimony that she was enrolling in another school.⁷⁹

In upholding the trial court's ruling, however, the court of appeals incorrectly referred to the rule that prohibits impeachment by proof of a collateral matter.⁸⁰ The appellate court stated: "More importantly, however, is the fact that a collateral matter cannot be made the basis for impeachment."⁸¹ The court's application of the collateral issue rule to a question asked on cross-examination was improper and not supported by the authority cited in the opinion. *Brown v. State*,⁸² cited in *Razo*,⁸³ did not deal with the propriety of a question asked during cross-examination. Rather, *Brown* involved the use of extrinsic

⁷⁷See, e.g., *Harrington v. Vandalia-Butler Board of Education*, 649 F.2d 434, 441 (6th Cir. 1981); *Florida Board of Trustees of Internal Improvement Trust Fund v. Charley Toppino & Sons, Inc.*, 514 F.2d 700, 704 (5th Cir. 1975); *Saxton v. McDonnell Douglas Aircraft Co.*, 428 F. Supp. 1047, 1049 (C.D. Cal. 1977); *United States v. Webber*, 270 F. Supp. 286, 289 (D. Del. 1967), *aff'd*, 396 F.2d 381, 386 (3d. Cir. 1968); see also 1 F. WHARTON, WHARTON'S CRIMINAL EVIDENCE § 63, at 134-36 (12th ed. 1955). But see *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 509-10 (4th Cir.), *cert. denied*, 434 U.S. 1020 (1977).

⁷⁸431 N.E.2d 550 (Ind. Ct. App. 1982).

⁷⁹*Id.* at 553.

⁸⁰See *Bush v. State*, 189 Ind. 467, 482, 128 N.E. 443, 448 (1920); 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1006 (Chadbourn rev. 1970).

⁸¹431 N.E.2d at 553.

⁸²417 N.E.2d 333 (Ind. 1981).

⁸³431 N.E.2d at 554.

evidence, in the form of a deposition, to contradict what the defendant believed would be the testimony of a prosecution witness. Because the contradiction shown by the extrinsic evidence went merely to a collateral matter, the court in *Brown* correctly ruled it was inadmissible.⁸⁴ The holding in *Brown*, however, does not mean that it is improper to ask a witness about a collateral matter on cross-examination.

The general rule, followed in Indiana⁸⁵ and in other jurisdictions,⁸⁶ permits a cross-examiner to ask questions on collateral matters, which are designed to create inconsistencies in a witness' testimony, in an attempt to cast doubt upon the accuracy of the testimony. This questioning is permissible even though the inconsistencies relate only to collateral matters.⁸⁷ The cross-examiner is, however, bound by the witness' answer and may not offer extrinsic evidence that the answer to a question dealing with a collateral matter is in fact false.⁸⁸ The object of the rule that prohibits impeachment by introducing extrinsic evidence on collateral issues is to prevent confusion of issues and unfair surprise.⁸⁹ As stated by Professor Wigmore, "it follows that the cross-examiner may at least *question upon even collateral points*, subject always to the general discretion of the trial court"⁹⁰ Notwithstanding *Razo*, Indiana law is in accord with Professor Wigmore's statement.⁹¹

⁸⁴417 N.E.2d at 339. See J. WIGMORE, *supra* note 80, §§ 1000-03.

⁸⁵See *Bush v. State*, 189 Ind. 467, 482, 128 N.E. 443, 448 (1920); *Miller v. State*, 174 Ind. 255, 261, 91 N.E. 930, 932 (1910); *Dunn v. State*, 162 Ind. 174, 182, 70 N.E. 521, 524 (1904).

⁸⁶See J. WIGMORE, *supra* note 80, § 1006.

⁸⁷*Id.* § 1006(2).

⁸⁸*Id.* §§ 1000-03.

⁸⁹*Id.* § 1002.

⁹⁰*Id.* § 1006(2).

⁹¹See *Gutierrez v. State*, 395 N.E.2d 218, 223 (Ind. 1979) (the scope of cross-examination on collateral matters is within the discretion of the trial court).

IX. Insurance

JOHN C. TRIMBLE*

Few, if any, of the cases during this survey period made significant changes in the body of Indiana insurance law. The cases that have been surveyed herein are the ones that, in this author's judgment, state a new holding or are noteworthy because they provide a practical example of how an insurance case should or should not be handled.¹

A. Arson Cases

During the 1982 survey period, the Indiana appellate courts decided three fire cases of significant interest. All three cases involved arson. Two of the three cases provide general guidelines that insurance companies may wish to observe in adjusting claims involving suspected arson, if they wish to avoid punitive damages in subsequent litigation over a denial of coverage. The third case deals with whether an in-

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¹There were other interesting insurance cases during the survey period that confirmed existing law. See, e.g., Siebert Oxidermo, Inc. v. Shields, 430 N.E.2d 401 (Ind. Ct. App. 1982) (confirming general rule that the attorney retained by an insurance company to defend insured has the ethical duty to represent insured's interest only); Wallace v. Indiana Ins. Co., 428 N.E.2d 1361 (Ind. Ct. App. 1981) (confirming rule that Indiana recognizes as valid those contract provisions that limit insured's time to sue the company on the policy); Barmet of Indiana, Inc. v. Security Ins. Group, 425 N.E.2d 201 (Ind. Ct. App. 1981) (confirming Indiana rules pertaining to construction to be given to ambiguous contract); Protective Ins. Co. v. Coca-Cola Bottling Co., 423 N.E.2d 656 (Ind. Ct. App. 1981) (confirming and supplementing Indiana's rules pertaining to waiver and estoppel) (also contained an interesting discussion about a "Truckmen's Endorsement" to an automobile liability policy); Town & County Mut. Ins. Co. v. Savage, 421 N.E.2d 704 (Ind. Ct. App. 1981) (confirming rule that insurance agent has duty to use reasonable care in undertaking to supply insurance) (also established that an insured may get prejudgment interest from the company on disputed losses where the amount in dispute exceeds policy limits); Aetna Casualty & Sur. Co. v. Dolson, 421 N.E.2d 691 (Ind. Ct. App. 1981) (confirming rule that arbitration of an uninsured motorist claim can be waived by either party, if the party fails to request arbitration and litigates the matter before a court of competent jurisdiction); Borgman v. Borgman, 420 N.E.2d 1261 (Ind. Ct. App.), *reh'g granted*, June 24, 1981 (confirming life insurance rule that the insured can effectively change the beneficiary without completing every ministerial act involved if the insured did everything in his power to effect such change).

One additional case is of interest to insurance practitioners; however, it is discussed more extensively in the workers' compensation article. See Baker v. American States Ins. Co., 428 N.E.2d 1342 (Ind. Ct. App. 1981) (stating that the exclusive remedy provision of the Indiana Workmen's Compensation Act did not bar an employee's lawsuit against the employer's insurance company where the insurer was sued for fraud and bad faith in negotiating the employee's compensation claim). See also Coriden, *Workers' Compensation, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 433, 442 (1983).

sured can recover under a fire insurance policy when the fire damage has been caused by an act of arson committed by a fellow insured.

1. *Punitive Damages for Bad Faith Denial of Insured's Fire Claim.*—The two arson cases during the survey period that involved punitive damages were *Hoosier Insurance Co. v. Mangino*² and *Riverside Insurance Co. v. Pedigo*.³ In both cases, the appellate court noted that there was sufficient circumstantial evidence to support the company's denial of the insureds' fire claims on the basis of arson.⁴ However, in each case the jury had found for the insured. The two cases differ in that one company was assessed punitive damages, but the other was not.

In *Hoosier Insurance Co. v. Mangino*,⁵ the insurance company was confronted with a fire loss claim in which the circumstances surrounding the loss included several of the recognized indicators of arson.⁶ Among those indicators present were facts that suggested that the fire was of an incendiary origin, that the insureds had a meager income the year before the fire and the insured husband was unemployed at the time of the fire, that the significant personal property owned by the insureds had been paid for in cash, and that there were very few contents in the house at the time of the fire.

The fire in question occurred on December 22, 1976. By January 10, 1977, the insureds had provided Hoosier's adjuster with a signed and completed proof of loss statement wherein they sought recovery for the damage to the house, for the loss of personal property, and for the cost of living expenses. Hoosier responded on February 24, 1977, by denying liability and by declaring the policy of insurance void as to the Manginos.⁷ Hoosier based its denial of coverage upon a clause contained in the policy that provided:

"This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto."⁸

²419 N.E.2d 978 (Ind. Ct. App. 1981).

³430 N.E.2d 796 (Ind. Ct. App. 1982).

⁴430 N.E.2d at 806-07; 419 N.E.2d at 987-88.

⁵419 N.E.2d 978 (Ind. Ct. App. 1981).

⁶For a general discussion regarding the type of evidence that may be admissible to prove arson in fire cases involving wilful destruction of property, see 19 G. COUCH, CYCLOPEDIA OF INSURANCE LAW §§ 79:561-570 (2d ed. 1968 & Supp. 1981).

⁷419 N.E.2d at 980. In addition, Hoosier returned \$75 dollars of unearned premiums. *Id.*

⁸*Id.* at 990 (quoting Hoosier Insurance Company's Property Insurance Policy). The policy provision relied upon by Hoosier is one that is frequently relied upon by in-

Following Hoosier's denial of coverage, the Manginos filed suit for breach of contract; the Manginos sought, in addition to compensatory damages, punitive damages for Hoosier's alleged malicious denial of coverage. The jury awarded the Manginos both compensatory and punitive damages. On appeal, Hoosier sought only to overturn the punitive damages award.⁹ The Indiana Court of Appeals reversed the judgment awarding punitive damages because "[i]n view of all the evidence presented, the jury could not have reasonably concluded that elements of fraud, misrepresentation, malice, gross negligence, or oppression mingled in Hoosier's denial of Manginos' claim or in any other aspect of Hoosier's conduct."¹⁰

The plaintiffs had put forth several evidentiary facts in support of their contention that Hoosier's conduct was oppressive and therefore deserving of punishment.¹¹ None of this evidence was given any weight by the court. One piece of evidence, however, does deserve mention.

Prior to the time the adjuster representing Hoosier adjusted the claim, he required the Manginos to sign a "Non-Waiver Agreement". The non-waiver agreement stated, in essence, that Hoosier Insurance Company would not be deemed to have waived any of its policy conditions simply by an act of investigating the claim.¹² The court accepted Hoosier's explanation that obtaining a non-waiver agreement was a routine matter in adjusting an insurance claim, and found that requiring the non-waiver agreement did not amount to misconduct.¹³

The main legal proposition to be gleaned from the *Hoosier* case is that insurance companies have a "right to disagree" with their insureds about the existence of coverage, as long as they are doing so in good faith.¹⁴ The court stated that, in the context of an insurance contract action, a company is acting in bad faith if it has no legitimate reason for denying the insured's claim but, nevertheless, does deny

surance companies to deny fire claims in which arson is suspected. It is sometimes referred to as the "false swearing" provision. See 14 G. COUCH, CYCLOPEDIA OF INSURANCE LAW §§ 49:551-563 (2d ed. 1965 & Supp. 1981). An insurance company may also deny coverage because of arson even if the policy does not contain a specific exclusion for arson. Fire insurance policies are said to contain an "implied exception" that prevents an insured from recovering for a loss he has intentionally or fraudulently caused. See R. KEETON, BASIC TEXT ON INSURANCE LAW § 5.3(a) (1971) cited with approval in American Economy Ins. Co. v. Liggett, 426 N.E.2d 136, 141 (Ind. Ct. App. 1981).

⁹419 N.E.2d at 980.

¹⁰Id. at 991.

¹¹Id. at 988-91.

¹²Id. at 988-89 & n.2.

¹³Id. at 989.

¹⁴Id. at 982-83 (citing Vernon Fire & Casualty Ins. Co. v. Sharp, 264 Ind. 599, 609-10, 349 N.E.2d 173, 181 (1976)).

the claim.¹⁵ Here, although Hoosier may have lost the disagreement with its insured, it was not penalized for disagreeing.

Lawyers representing insurance companies or aggrieved insureds may refer to the *Hoosier* case for guidelines on how an insurance company should adjust a claim for suspected arson. The *Hoosier* case may be particularly helpful when it is contrasted with the unsuccessful adjusting procedures followed in *Riverside Insurance Co. v. Pedigo*.¹⁶

The facts in *Riverside* pertaining to the question of arson are very similar to those in *Mangino*. In *Riverside*, there was evidence that the fire was incendiary in origin, that the closets in the house were empty, and that the insureds were experiencing financial difficulty at the time of the fire. As in *Mangino*, the appellate court found that there was sufficient evidence to support *Riverside*'s arson defense had the jury chosen to accept it.¹⁷ However, the jury had not accepted it. The jury had returned a verdict against *Riverside* on the arson defense and had assessed a sizeable punitive damages award, which the appellate court did not reverse.

The key to the opposite results regarding punitive damages in *Mangino* and *Riverside* is the difference in which the two companies adjusted the fire loss claims. In *Mangino*, the loss was adjusted and the claim was denied in a period of approximately two months. The denial of coverage was firm and was based upon a policy condition. By contrast, in *Riverside*, although the insurance company began an arson investigation almost immediately after receiving the insureds' claim, the insureds were never notified of the company's arson suspicion. Instead, *Riverside* repeatedly turned down the insureds' claim because of alleged technical deficiencies with the proof of loss statements the insureds had submitted to the company. Six months after the fire, *Riverside* was still denying the claim because of technical problems.

In upholding the punitive damages award, the court of appeals found that *Riverside* had abused its "right to disagree."¹⁸ The court emphasized that the delay caused by *Riverside*'s misrepresentations and concealment "arguably prejudiced [the insureds'] ability to prove their innocence."¹⁹ *Riverside* knew as soon as one month after the fire that it would deny the claim on the basis of arson.²⁰ The court found

¹⁵419 N.E.2d at 983 (citing *Rex Ins. Co. v. Baldwin*, 163 Ind. App. 308, 313-14, 323 N.E.2d 270, 274 (1975)).

¹⁶430 N.E.2d 796 (Ind. Ct. App. 1982).

¹⁷*Id.* at 806-07.

¹⁸*Id.* at 808 (citing *Vernon Fire & Casualty Ins. Co. v. Sharp*, 264 Ind. 599, 349 N.E.2d 173 (1976) and *Hoosier Ins. Co. v. Mangino*, 419 N.E.2d 978 (Ind. Ct. App. 1981)).

¹⁹430 N.E.2d at 808.

²⁰*Id.*

that the public interest would be served by allowing punitive damages because it might deter similar dilatory conduct in the future.²¹

It is apparent from a comparison of *Hoosier* and *Riverside* that if Indiana insurance companies wish to safely exercise their "right to disagree" in the case of a suspected arson claim, they must investigate as quickly as possible and they must be straightforward with their insureds. If a thorough early investigation points to arson, it would probably be best for the company to deny coverage on that basis and to bring the coverage question to a head without delay. Later, if the facts point away from arson, then the claim can be settled without the company's exposure to punitive damages. It is a company's unjustified delay in making its position known to the insured that exposes the company to punitive damages. When the delay is coupled with misrepresentation, then punitive damages are truly a threat, and the company's ability to prevail upon its arson defense is prejudiced by the loss of credibility that flows from the delay and misrepresentation.

2. *Validity of Claim by One Named Insured When Arson is Committed by Other Named Insured.*—In *American Economy Insurance Co. v. Liggett*,²² the Indiana Court of Appeals was faced with a case of first impression. The plaintiff and her late husband had been the named insureds on a homeowner's policy issued by American Economy. The insured property was damaged in a fire in which the plaintiff's husband died. The company conceded that the plaintiff was innocent of wrongdoing but alleged that the fire had been deliberately set by the husband.²³ The plaintiff's claim under the policy was denied because the company contended that her proof of loss statement violated the false swearing provision of the policy.²⁴

The true underlying issue in this case, however, was not whether the false swearing provision of the policy was applicable. The court immediately pointed out that the provision was not applicable, because the insurance company had stipulated that the plaintiff had neither participated in nor had any knowledge of the arson.²⁵ Rather, the true issue was whether Indiana would adopt the established general rule "that where one of two or more insureds intentionally caused the loss to the insured property, the remaining insureds, although entirely innocent of any wrongdoing, could not recover."²⁶

In discussing what Indiana would do in this situation, the court

²¹*Id.* at 804.

²²426 N.E.2d 136 (Ind. Ct. App. 1981).

²³*Id.* at 137-38.

²⁴*Id.* at 138. For an explanation of the false swearing provision, see *supra* note 8.

²⁵426 N.E.2d at 139.

²⁶*Id.* at 138.

began by pointing out that the established general rule had been seriously eroded.²⁷ Recent cases have taken the position that the rights of named insureds under a fire policy are several, not joint, and that the individual insured who is free of wrongdoing should reasonably expect that his coverage would not be jeopardized by a fellow insured's intentional acts, unless the policy specifically excluded coverage under those circumstances.²⁸

The court noted that in spite of the erosion in the general rule, some jurisdictions have continued to follow the rule when the insureds were husband and wife.²⁹ These courts gave either one or both of two reasons for following the rule. One reason given was that because married couples have long been regarded by many states as one legal entity, their rights and obligations under an insurance policy were considered to be joint and not several.³⁰ The second reason given was that the courts found it impossible to identify the interest of the innocent spouse and thus preferred to deny recovery completely.³¹ This second reason applied when the husband and wife held the insured property as tenants by the entireties.

The Indiana court in *American Economy* refused to apply the established rule to situations involving married couples, rejecting both of these reasons. The court discounted the "one legal entity" rationale by stating that:

Western civilization is based upon the premise of individual responsibility for wrongdoing. We do not impose vicarious liability for torts (including fraud) on our spouses just because of the marital relationship. More appropriately, since arson is a crime, we do not impose vicarious liability for criminal conduct upon those who are totally innocent whether they are married to the criminal or not.³²

²⁷*Id.* at 139 (citing *Hoyt v. New Hampshire Fire Ins. Co.*, 92 N.H. 242, 29 A.2d 121 (1942)).

²⁸426 N.E.2d at 139.

²⁹*Id.* See generally *Kosior v. Continental Ins. Co.*, 299 Mass. 601, 13 N.E.2d 423 (1938); *Matyuf v. Phoenix Ins. Co.*, 27 Pa. D.&C.2d 351 (1933); *Jones v. Fidelity & Guar. Ins. Corp.*, 250 S.W.2d 281 (Tex. Civ. App. 1952); *Cooperative Fire Ins. Assoc. v. Domina*, 137 Vt. 3, 399 A.2d 502 (1979); *Rockingham Mut. Ins. Co. v. Hummel*, 219 Va. 803, 250 S.E.2d 774 (1979); *Klemens v. Badger Mut. Ins. Co.*, 8 Wis. 2d 565, 99 N.W.2d 865 (1959); *Annot.*, 24 A.L.R.3d 450, 452-53 (1969).

³⁰426 N.E.2d at 139 (citing *Rockingham Mut. Ins. Co. v. Hummel*, 219 Va. 803, 806, 250 S.E.2d 774, 776 (1979)).

³¹426 N.E.2d at 139 (citing *Cooperative Fire Ins. Assoc. v. Domina*, 137 Vt. 3, 399 A.2d 502 (1979)). See also *Matyuf v. Phoenix Ins. Co.*, 27 Pa. D.& C.2d 351 (1933). But see *Morgan v. Cincinnati Ins. Co.*, 411 Mich. 267, 307 N.W.2d 531 (1981); *Lovell v. Rowan Mut. Fire Ins. Co.*, 302 N.C. 150, 274 S.E.2d 170 (1981).

³²426 N.E.2d at 140.

In rejecting the impossibility reasoning, the court noted that because entireties property is easily divisible in divorce and other similar situations, a trial court should have no difficulty in dividing marital property in situations like the one at bar.³³ The court also pointed out that the entireties distinction was meaningless in the present case, because, with the husband dead, the plaintiff owned all of the property as a survivor.³⁴

In rejecting the traditional reasons for denying coverage, the court referred to what it termed as the "right reasons" for possibly denying coverage in other cases. The court suggested that one reason to deny coverage would be to prevent a guilty person from profiting directly or indirectly from his wrongdoing.³⁵ To deny recovery for this reason, a court would have to conduct a case by case analysis of the facts to determine whether one guilty spouse would benefit if the other recovered.³⁶

A second reason for denying coverage in similar cases is to honor what the court referred to as the "implied exception" to coverage. In essence, the implied exception is that insurance policies do not insure against losses that are not fortuitous from the standpoint of the person who is to benefit from the coverage³⁷—usually the insured. If the loss is caused intentionally by the person who will benefit from it, then coverage will be denied, even if the policy is silent on the question of losses that are not fortuitous. This implied exception is based both upon the specific expectation the insured should have that his policy will not cover losses that are not fortuitous and upon public policies against fraud on insurance companies, profit from wrongdoing, and crime in general.³⁸

The court found that the implied exception did not apply in the present case because none of the policy considerations would be served by applying it.³⁹ Further, the fact that the loss in *American Economy* was allegedly caused by the plaintiff's husband did not make the loss nonfortuitous as to the plaintiff.⁴⁰

³³*Id.*

³⁴*Id.*

³⁵*Id.*

³⁶*Id.* The court also noted that this reason did not apply in the present case because the guilty party was dead.

³⁷*Id.* at 141 (citing R. KEETON, BASIC TEXT ON INSURANCE LAW § 5.3(a) (1971)). As a legal matter, fortuitousness is to be viewed from the standpoint of the person making the claim. That person may be an insured or merely a beneficiary of the policy. 426 N.E.2d at 142.

³⁸426 N.E.2d at 141 (citing R. KEETON, BASIC TEXT ON INSURANCE LAW § 5.3(a) (1971)).

³⁹426 N.E.2d at 141.

⁴⁰*Id.* at 142.

The court went much further than it needed to in deciding this case.⁴¹ The fact that the alleged wrongdoer died makes the final result much easier to reach and probably limits the holding to the facts of the case.⁴² When the wrongdoer spouse survives, the court will have to review the situation to determine whether any of the "right reasons" for denying coverage exist.

Interestingly, the court provided a means by which insurance companies may, in the future, avoid a controversy as occurred in *American Economy*. The court suggested that the companies could make the policy clear and unambiguous by placing the following legend across the front of the policy in red ink:

IF YOU OR ANY PERSON INSURED BY THIS POLICY
DELIBERATELY CAUSES A LOSS TO PROPERTY
INSURED THEN THIS POLICY IS VOID AND WE WILL
NOT REIMBURSE YOU OR ANYONE ELSE FOR THAT
LOSS.⁴³

To predict whether such a clause would be binding in the face of the standard challenge that insurance policies are adhesion contracts would be speculative. However, insurance companies may wish to incorporate such a clause in their policies if they have not done so already. The use of such a clause would certainly make a denial of coverage by a company much clearer than a denial under existing false swearing clauses.

B. Automobile Cases

1. *Cancellation vs. Nonrenewal—Duty of Insurer to Give Notice to Insured.*—In *American Family Mutual Insurance Co. v. Ramsey*,⁴⁴ the court of appeals was called upon to distinguish between the cancellation of an insurance policy and the nonrenewal of a policy for the purpose of determining whether notice to the insured was required under the circumstances.

⁴¹See *id.* at 145 (Staton, J., concurring).

⁴²The court noted that only one other reported case, *Howell v. Ohio Casualty Ins. Co.*, 124 N.J. Super. 414, 307 A.2d 142 (Law Div. 1973), modified, 130 N.J. Super. 350, 327 A.2d 240 (App. Div. 1974), is "on all fours" with the present case. 426 N.E.2d at 143. The court also extensively cited less similar cases involving husbands and wives as fellow insureds. See *Hosey v. Seibels Bruce Group, S.C. Ins. Co.*, 363 So. 2d 751 (Ala. 1978); *Steigler v. Insurance Co. of N. Am.*, 384 A.2d 398 (Del. 1978); *Auto Owners Ins. Co. v. Edinger*, 366 So. 2d 123 (Fla. Dist. Ct. App. 1979); *Economy Fire & Casualty Co. v. Warren*, 71 Ill. App. 3d 625, 390 N.E.2d 361 (1979); *Hildebrand v. Holyoke Mut. Fire Ins. Co.*, 386 A.2d 329 (Me. 1978); *Simon v. Security Ins. Co.*, 390 Mich. 72, 210 N.W.2d 322 (1973); *Winter v. Aetna Casualty & Sur. Co.*, 96 Misc. 2d 497, 409 N.Y.S.2d 85 (1978).

⁴³426 N.E.2d at 141.

⁴⁴425 N.E.2d 243 (Ind. Ct. App. 1981).

The plaintiff originally procured an automobile policy with American Family on December 4, 1976. The policy contained the following language with respect to renewal: “[T]he renewal of this policy may be refused by the named insured by refusing to pay the renewal premium when due; in which event the policy shall terminate at the end of the last policy period for which premium was paid.”⁴⁵ The policy also stated that no notice of nonrenewal would be required “if the named insured fails to discharge when due any of his obligation in connection with the payment of the renewal premium.”⁴⁶

The last policy period for the insured’s policy ended on June 4, 1979. Sometime in May 1979, the company sent the insured a premium notice indicating that the premium was due “on or before June 4, 1979” in order for the insurance to continue. The notice also declared that payment would be considered to have been made when it was received by the company and not when it was mailed. Prior to this time, the insured had regularly renewed the policy. This time, however, the insured failed to pay his premium.

Approximately two weeks after the last policy period ended, Ramsey was in an automobile accident. When Ramsey submitted a claim to the company, the company denied coverage and Ramsey filed suit for breach of contract. The issue raised was whether the company had an obligation to give notice that the policy had not continued in effect after the June 4, 1979 date.⁴⁷

The court first looked to the Indiana statutes that pertain to the notice required to be given by an insurer to the insured, if a policy is cancelled or not renewed.⁴⁸ The court pointed out that although the term “renewal” is defined in the statutes, the term “cancellation” is not.⁴⁹ “Renewal” is defined as

“the issuance and delivery by an insurer of a policy replacing at the end of the policy period a policy previously issued and delivered by the same insurer insuring the same insured, or the issuance and delivery of a certificate or notice extending the term of a policy beyond its policy period or term”⁵⁰

Relying upon the statutory definition for renewal, the court distinguished the term “cancellation” from the term “nonrenewal” by saying that “the term ‘cancellation’ refers to the termination of a policy prior to the end of the policy period, whereas a ‘non-renewal’ is the

⁴⁵*Id.* at 243 (quoting insurance policy).

⁴⁶*Id.* (quoting insurance policy).

⁴⁷*Id.* at 244.

⁴⁸*Id.* (citing IND. CODE §§ 27-7-6-1 to -6 (1976)).

⁴⁹425 N.E.2d at 244.

⁵⁰*Id.* (quoting IND. CODE § 27-7-6-3 (1976)).

nonissuance or nondelivery of a new policy at the end of the previous policy period.”⁵¹

The court found that the occurrence at issue was a nonrenewal not a cancellation and, thus, the cancellation notice statute did not apply.⁵² In fact, the court pointed out that the cancellation statute specifically states that “[t]his section shall not apply to non-renewals.”⁵³ The court then went on to review the renewal notice statute, which provides:

“No insurer shall fail to renew a policy unless it shall mail or deliver to the named insured, at the address shown in the policy, at least twenty [20] days’ advance notice of its intention not to renew. In the event such policy was procured by an agent duly licensed by the state of Indiana notice of intent not to renew shall be mailed or delivered to such agent at least ten [10] days prior to such mailing or delivery to the named insured unless such notice of intent is or has been waived in writing by such agent.

This section shall not apply: (a) if the insurer has manifested its willingness to renew nor (b) in case of nonpayment of premium. Provided, That, notwithstanding the failure of an insurer to comply with this section, the policy shall terminate on the effective date of any other insurance policy with respect to any automobile designated in both policies.”⁵⁴

The court found that because the insured had failed to pay his premium, his policy had lapsed at the time of the accident and the company was not required to give notice to the insured that coverage had terminated.⁵⁵

Now that the court of appeals has defined the term “cancellation” and distinguished it from the term “nonrenewal,” controversies of this nature should not arise in the future because any existing ambiguity has been cleared up.

2. *Duty to Defend Insured—Notice of Suit to Company.*—In *F & F Construction Co. v. Royal Globe Insurance Co.*,⁵⁶ the insured sued Royal Globe, its insurance company, for breach of the insurance company’s duty to defend. Royal Globe contended that it had not received notice of the lawsuit against the insured, and the court agreed.⁵⁷

⁵¹425 N.E.2d at 244.

⁵²*Id.*

⁵³*Id.* at 244 n.2 (quoting IND. CODE § 27-7-6-5 (1976)).

⁵⁴425 N.E.2d at 244 (quoting IND. CODE § 27-7-6-6 (1976)) (emphasis added by court).

⁵⁵425 N.E.2d at 244.

⁵⁶423 N.E.2d 654 (Ind. Ct. App. 1981). For a discussion of the evidentiary aspects of this case, see Carlson, *Evidence, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 191, 199 (1983).

⁵⁷423 N.E.2d at 656.

The case arose when an employee of F & F Construction was involved in an automobile accident with a third party. Before any suit was filed, an attorney representing the third party apparently contacted F & F Construction. Through F & F Construction, Royal Globe became involved in the case, at least to the extent of discussing the claim with the third party's attorney. Thereafter, suit was filed against F & F Construction and the proper papers were served upon F & F Construction's company president. The president turned the papers over to his office manager and asked that they be forwarded to the insurance company. Following that event, the route taken by the papers is uncertain; however, Royal Globe did not receive the papers and a default judgment was entered against F & F Construction. In the suit by F & F Construction against Royal Globe for failure to defend, Royal Globe defended itself on the basis that F & F Construction had failed to meet a condition precedent that required F & F Construction to "immediately forward to the company every demand, notice, summons or other process received by [it]."⁵⁸

There are two points of interest to be gleaned from this case. First, the court described the quantum of proof necessary for an insured to prove that a summons has been forwarded to the company. The court said that "[n]ormal office procedure in preparing and dispatching outgoing mail is not sufficient to prove mailing, instead, proof consisting of testimony from one with direct and actual knowledge of the particular message in question is required to establish proof of mailing."⁵⁹

The second, and most significant point of the case is that the court held that the notice Royal Globe had received of the third party's claim was not sufficient actual or constructive notice of the pending litigation.⁶⁰ The court's holding on this point may imply that the court does not recognize any continuing duty on the part of an insurance company to monitor the progress of a claim against an insured, even though the company has notice of the claim's existence. The result certainly would have been different if the attorney representing the third party had informed the insurer of the suit being filed. Almost any notice to the company of the commencement of litigation, be it oral or written, would probably have been enough here to implicate the company's duty to defend.⁶¹

⁵⁸*Id.* (quoting insurance policy).

⁵⁹*Id.* at 656 (citing *United Farm Bureau Mut. Ins. Co. v. Adams*, 145 Ind. App. 516, 251 N.E.2d 696 (1969)).

⁶⁰See 423 N.E.2d at 656.

⁶¹If a company receives notice of litigation from a source other than its insured, it may be hard pressed to rely on the breach of a contractual provision to avoid coverage. For example, in order for a company to avoid coverage because of its insured's failure to cooperate, the company must show that it was actually prejudiced

Arguably, however, unless a claim has been turned over to an insurance company prior to the commencement of litigation, an insurer may not have a duty to immediately defend the insured merely because it has learned of the existence of litigation against the insured. The insured has a right not to invoke his insurance coverage, if he so chooses. As a practical matter though, few insured persons ignore the coverage for which they have paid.

3. *Waiver and Estoppel—Waiver of Insurer's Right to Subrogation.*—In *National Mutual Insurance Co. v. Fincher*,⁶² the insured was permitted to recover under the medical expense coverage of his automobile policy, notwithstanding the fact that he had previously destroyed the insurer's subrogation rights by settling with the third-party tortfeasor. The court found that the insurance company, National, had either waived its subrogation rights or was estopped from asserting them because the company had failed to pay the insured's legitimate claim for over a year, had induced the insured to settle with the third party for less than the full value of his claim, and had arbitrarily denied a portion of the insured's claim without justification.⁶³

This case arose when the insured was involved in an accident with an uninsured motorist. At the time of the collision, the insured had coverage for medical expenses, loss of income, and uninsured motorist coverage.⁶⁴ The insured initially brought suit against the uninsured motorist. While that suit was pending, the insured filed a claim with National for medical expenses and lost wages. When National failed to pay the claim, the insured joined National as an additional defendant in the lawsuit. Subsequently, the insured received an offer to settle with the third party for less than the full value of his claim. When National was informed of the settlement offer, its attorney advised the insured to accept the settlement. In addition, National's attorney advised the insured of the company's subrogation rights and informed the insured that acceptance of the settlement would constitute a waiver of the insured's medical expense claim under the policy.⁶⁵ The insured accepted the settlement and gave the third party a covenant

in conducting a defense. *Motorists Mut. Ins. Co. v. Johnson*, 139 Ind. App. 622, 631, 218 N.E.2d 712, 717 (1966). In the context of the insured's failure to give notice, actual prejudice to the company need not be shown. *Muncie Banking Co. v. American Sur. Co.*, 200 F.2d 115, 118-20 (7th Cir. 1952). The emphasis is on providing the company with adequate time to protect its interests. *Id.* Thus, if the company has notice of litigation from another source, it can protect its interest and should not be permitted to deny coverage if the insured's failure to give notice is excusable.

⁶²428 N.E.2d 1386 (Ind. Ct. App. 1981).

⁶³*Id.* at 1391.

⁶⁴*Id.* at 1387.

⁶⁵*Id.* at 1388.

not to sue. The insured continued to pursue his action for medical expenses and lost wages against National and ultimately received a judgment for medical expenses.⁶⁶

On appeal, National urged the court to reverse the judgment on the theory that the insured could not collect against the company once the insured had recovered from a third party and had given the third party a covenant not to sue. National argued that the insured had compromised the company's subrogation rights and, therefore, had breached the policy requirement that " '[i]n the event of any payment under this insurance . . . [the insured] shall do nothing after loss to prejudice such [subrogation] rights.' "⁶⁷

In response to National's position, the court acknowledged the general rule that if an insured settles with a wrongdoer, he is barred from any action on the insurance policy.⁶⁸ The rationale behind this rule is that the release of the tortfeasor destroys the insurance company's subrogation rights under the policy, because the company's rights against the wrongdoer are identical to those of the insured.⁶⁹ In spite of the above-mentioned rule, however, the court found that National was prevented from asserting the rule's application because National had induced the insured to settle with the third party.⁷⁰

The court recognized three situations in which an insurer may be held to have waived its subrogation rights or is estopped to assert them: "[W]aiver or estoppel by the insurer in this regard may consist of a direct suggestion of settlement, an unreasonable delay in satisfying its obligation under the policy, or an arbitrary denial of a claim."⁷¹ In the present case, the court found that the insurer had done all three.⁷² Thus, a waiver or estoppel was an appropriate conclusion.

This case is indicative of the confusion that exists among laymen, attorneys, and insurance companies about the nature of subrogation. Many laymen would prefer to recover a small loss directly from a wrongdoer because they fear a rise in their insurance rates if they make a claim with their insurance company. However, collection directly from the wrongdoer is less certain and frequently takes longer to accomplish. Thus, the insured is put in a position in which he makes claims in both directions, as in the present case. In this situation, the insured or his attorney would be well advised to consult the insurance

⁶⁶*Id.*

⁶⁷*Id.* at 1389 n.6 (quoting insurance policy).

⁶⁸*Id.* at 1389 (citing *Hockelberg v. Farm Bureau Ins. Co.*, 407 N.E.2d 1160 (Ind. Ct. App. 1980)).

⁶⁹428 N.E.2d at 1389.

⁷⁰*Id.* at 1391.

⁷¹*Id.* at 1390 (citing numerous other jurisdictions).

⁷²*Id.* at 1391.

company and determine exactly what the company's position will be. The insured may discover that it would be cheaper for him to get his money from the company and let the company bear the expense of pursuing the wrongdoer. Obviously, a person should not carry collision, comprehensive, medical expense, or loss of income insurance if his fear of increased premiums is going to deter him from making a claim.

C. General Liability Cases

1. *Homeowner's Insurance—Business Pursuits Exception.*—In *Economy Fire & Casualty Co. v. Beeman*,⁷³ the insured was an electrician who was called to a fast food restaurant to repair an electrical appliance. While the insured was at the restaurant, he picked up or moved an employee of the restaurant who was standing in front of the appliance to be repaired. As an alleged result of the contact made by the insured, the employee was injured. This case presented to the Court of Appeals for the Seventh Circuit the issue whether the insured's conduct was covered by the personal liability coverage of an insured's homeowner's insurance policy issued by Economy.⁷⁴

The personal liability coverage of the policy in question contained an exclusion that denied coverage for losses "arising out of business pursuits of any Insured except activities therein which are ordinarily incident to non-business pursuits."⁷⁵ The injured employee argued that the insured's act of moving her was an act ordinarily incident to non-business pursuits. She contended that the court should analyze the insured's conduct by determining whether the conduct at the moment of the injury was "necessary to the business pursuit."⁷⁶

The court rejected the employee's analysis stating that "[t]o the contrary, numerous cases have held activities resulting in injury to be incident to business pursuits, even though the actions in question were not strictly necessary, and in most events, were counterproductive to carrying out the business activities."⁷⁷ The court affirmed the trial court's finding that no coverage existed because the injury was caused while the insured was engaged in a business pursuit.⁷⁸

Unfortunately, the court gave no standard by which to analyze future cases. The ruling is based upon comparisons that the court made with similar holdings in other jurisdictions.⁷⁹ The lack of analytical

⁷³656 F.2d 269 (7th Cir. 1981).

⁷⁴*Id.* at 270.

⁷⁵*Id.* (quoting insurance policy).

⁷⁶*Id.* at 271.

⁷⁷*Id.*

⁷⁸*Id.* at 272.

⁷⁹*Id.* at 271 (citing *Stanley v. American Fire & Casualty Co.*, 361 So. 2d 1030 (Ala. 1978); *Neil v. Celina Mut. Ins. Co.*, 522 S.W.2d 179 (Ky. Ct. App. 1975); *Pitre v. Penn-*

framework is particularly distressing in view of the court's comment earlier in the case that "[e]xclusionary clauses for business pursuits in homeowners' policies have spawned frequent litigation over the precise issue disputed here—whether a particular momentary act occurring within an overall business context is incident to the business pursuit or ordinarily incident to a nonbusiness pursuit."⁸⁰ The question presented by this case is probably not susceptible to easy analysis, yet *Economy* does not give any guidelines for the trier of fact to follow in such future cases, unless the factual setting is on all fours with prior precedent.

2. *Professional Liability Policy*.—In *Drake Insurance Co. v. Carroll County Sheriff's Department*,⁸¹ the insurance company sought a declaratory judgment to determine the extent of its duty to defend under a professional liability policy held by the county sheriff's department. In an earlier action, the administratrix and widow of a former prisoner had filed suit against the sheriff's department, alleging negligent supervision of the prisoner who had committed suicide while incarcerated in the Carroll County jail.⁸²

At the time of the prisoner's death, the sheriff's department had a professional liability insurance policy through Drake. The policy contained specific coverage for "Personal Injury" and separate coverage for "Bodily Injury."⁸³ Under both coverages, the insurance company had the right and the duty to defend the insured. The policy stated specifically that it did not apply "'to bodily injury to any person occurring while such person is in the custody of the insured or any municipal, state or federal authority.'"⁸⁴ The company utilized this exclusion to deny coverage and brought the present case as a declaratory judgment action to determine whether it had a duty to defend.

The Indiana Court of Appeals found that coverage did exist. In arriving at its ruling, the court analyzed the definitions contained in the policy for the term "Bodily Injury" and the term "Personal Injury." "Bodily Injury" was restricted to injuries that occurred during the course of an arrest.⁸⁵ "Personal Injury," on the other hand, referred

sylvania Millers Mut. Ins. Co., 236 So. 2d 920 (La. Ct. App. 1970); *Berry v. Aetna Casualty & Sur. Co.*, 221 So. 2d 272 (La. Ct. App. 1969); *Dieckman v. Moran*, 414 S.W.2d 320 (Mo. 1967); *North River Ins. Co. v. Poos*, 553 S.W.2d 500 (Mo. Ct. App. 1977); *Martinelli v. Security Ins. Co.*, 490 S.W.2d 427 (Mo. Ct. App. 1972); *Wiley v. Travelers Ins. Co.*, 534 P.2d 1293 (Okla. 1974); *Davis v. Frederick's, Inc.*, 30 Utah 2d 321, 517 P.2d 1014 (1973).

⁸⁰656 F.2d at 271.

⁸¹427 N.E.2d 1153 (Ind. Ct. App. 1981).

⁸²*Id.* at 1154.

⁸³*Id.*

⁸⁴*Id.*

⁸⁵*Id.* at 1155.

to such intrusions as " 'false arrest, erroneous service of civil papers, false imprisonment, malicious prosecution, libel, slander, defamation of character, [and] violation of property rights'"⁸⁶

The court found that the "Bodily Injury" coverage was not involved because the suicide occurred a day after the decedent was arrested.⁸⁷ The exclusion provision would also result in no coverage.⁸⁸ The court next looked to determine whether coverage could fall within the "Personal Injury" coverage. The only possible application could be for "violation of property rights." In order for the court to find coverage under the property rights concept, it had to look to Indiana's Wrongful Death Act.⁸⁹

In reviewing the Wrongful Death Act, the court pointed out that the Act provides recovery to the decedent's estate for the pecuniary loss caused by the death.⁹⁰ The court also noted that "[t]he right to sue emanates from the tortious act causing death, rather than from the person of the deceased."⁹¹ Thus, the suit by the administratrix against the sheriff's department was in the nature of protection of a property interest. The court found such a holding to be consistent with other Indiana cases, which had held wrongful death cases to be partly based on injury to property.⁹² However, the court held that coverage was owed only for the pecuniary loss occasioned by the death and not for those losses associated with the injury to the body of the decedent, such as medical expenses, funeral bills, etc.⁹³

The *Drake* court's legal reasoning is sound; however, the scope of coverage defined by the court is probably broader than originally intended by either party to the contract. The insurance company's attempt in the policy to exclude jailhouse injuries was obviously inadequate, but the attempted exclusion does demonstrate the company's intent not to cover such a loss. It is also doubtful that the sheriff's department had actual reasonable expectations that this type of loss would be covered, in light of the language of the exclusion provision. The court avoided the temptation to find the policy in question to

⁸⁶*Id.* (quoting from insurance policy) (emphasis added by court).

⁸⁷*Id.* at 1155.

⁸⁸*Id.*

⁸⁹*Id.* at 1155 n.1 (citing IND. CODE § 34-1-1-2 (1976)).

⁹⁰427 N.E.2d at 1155-56.

⁹¹*Id.* at 1156 (citing *In re Estate of Pickens*, 255 Ind. 119, 127, 263 N.E.2d 151, 156 (1970)).

⁹²427 N.E.2d at 1156 (citing *Graf v. City Transit Co.*, 220 Ind. 249, 41 N.E.2d 941 (1942); *Thompson v. Town of Fort Branch*, 204 Ind. 152, 178 N.E. 440 (1931); *Rush v. Leiter*, 149 Ind. App. 274, 271 N.E.2d 505 (1971); *Hahn v. Moore*, 127 Ind. App. 149, 133 N.E.2d 900 (1956); *Merritt v. Economy Dep't Store*, 125 Ind. App. 560, 128 N.E.2d 279 (1955).

⁹³427 N.E.2d at 1156.

be ambiguous;⁹⁴ however, the court would have been justified in finding the policy to be confusing and misleading.

D. Life Insurance Cases

In *Cook v. Equitable Life Assurance Society of the United States*,⁹⁵ the plaintiffs' decedent bought a life insurance policy in 1953 that named his wife at the time as beneficiary. By 1965, the decedent had divorced his first wife and remarried. After the divorce, the decedent stopped paying on the policy and it was converted from whole life to a paid-up term policy with coverage through 1986.⁹⁶ In 1976, the decedent made a holographic will in which he bequeathed the life insurance policy to his second wife and to a son by his second marriage. After the decedent died in 1979, the second wife made a claim for the benefits of the policy. The insurance company brought an interpleader action in the estate proceedings to determine who should receive the benefits of the policy.⁹⁷

The policy in question required that a change of beneficiary could only be made "by written notice to the Society" before the death of the insured.⁹⁸ Because the beneficiary had not been changed as required by the policy, the court of appeals held that the proceeds of the policy should go to the first wife who had been named as beneficiary.⁹⁹

The general rule that a change of beneficiary can only be effected through strict compliance with the policy requirements was established in Indiana by the 1887 case of *Holland v. Taylor*.¹⁰⁰ The court in *Cook* noted, however, that Indiana has recognized three exceptions to the general rule.¹⁰¹ First, strict compliance may not be necessary if the company has waived its own requirements. Second, strict compliance may not be required if it is beyond the insured's power to comply with the policy requirements. Finally, a change of beneficiary may be allowed without strict compliance if the insured has done everything within his power to accomplish the change but has been thwarted by death before the change was complete.¹⁰²

The court pointed out that all parties concerned benefit from the

⁹⁴See *id.* at 1155.

⁹⁵428 N.E.2d 110 (Ind. Ct. App. 1981).

⁹⁶*Id.* at 111-12.

⁹⁷*Id.* at 112.

⁹⁸*Id.* at 111.

⁹⁹*Id.* at 113.

¹⁰⁰111 Ind. 121, 12 N.E. 116 (1887).

¹⁰¹428 N.E.2d at 114 (citing *Heinzman v. Whiteman*, 81 Ind. App. 29, 139 N.E. 329 (1923); *Modern Bhd. v. Matkovich*, 56 Ind. App. 8, 104 N.E. 795 (1914)).

¹⁰²428 N.E.2d at 114.

rule requiring strict compliance with policy terms.¹⁰³ Obviously, the company benefits from having a certain beneficiary because the company is free to pay the policy proceeds without later being subjected to claims of which it had no prior notice or knowledge.¹⁰⁴ The insured benefits because he can rely upon having the proceeds of the insurance paid to the person he has designated.¹⁰⁵ Further, the beneficiary benefits because the payments will be more prompt if the insurance company does not have to wait until the decedent's will has been probated before it can safely make the payments.¹⁰⁶

Although the result of this case is harsh, the court's reasoning is sound. The court itself pointed out that bad law is made when courts try to use their equitable powers to achieve a good result despite applicable settled law.¹⁰⁷ The result may have been harsh under the circumstances, but it does allow for certainty and predictability in one area of Indiana law.

E. Statutory Developments

1. *Financial Responsibility of Motor Vehicle Owners and Operators.*—During the 102d Indiana General Assembly's term, the legislature made several changes that are of interest to insurance companies and insurance practitioners.¹⁰⁸ The most important addition to the financial responsibility laws was the new requirement that proof of financial responsibility must be shown at the time an application for registration of a motor vehicle is made.¹⁰⁹ A second important financial responsibility amendment came in the area of enforcement. As of January 1, 1983, persons who fail to prove financial responsibility will be committing a Class C misdemeanor.¹¹⁰ A third amendment increased the minimum limits of financial responsibility from \$15,000/\$30,000 to \$25,000/\$50,000 as of June 1, 1983.¹¹¹

¹⁰³*Id.* The majority of jurisdictions have ruled under similar circumstances that attempts by a will to change a life insurance beneficiary will not, without more, be sufficient to effect a change. For a listing of these jurisdictions, see 2A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 1078 (1966) and Annot., 25 A.L.R.2d 999 (1952).

¹⁰⁴428 N.E.2d at 115.

¹⁰⁵*Id.* at 114 (citing *Stover v. Stover*, 137 Ind. App. 578, 204 N.E.2d 374 (1965)).

¹⁰⁶428 N.E.2d at 115.

¹⁰⁷*Id.* at 116.

¹⁰⁸See generally Act of Feb. 25, 1982, Pub. L. No. 83, 1982 Ind. Acts 799 (codified at IND. CODE §§ 9-1-4-3.5, -2-1-11, -4-1-53.5 (1982)).

¹⁰⁹Act of Feb. 25, 1982, Pub. L. No. 83, 1982 Ind. Acts 799, 799 (codified at IND. CODE § 9-1-4-3.5 (1982)). At the time of the writing of this Article, the manner in which the proof is to be shown had not yet been determined.

¹¹⁰Act of Feb. 25, 1982, Pub. L. No. 83, 1982 Ind. Acts 799, 800 (codified at IND. CODE § 9-4-1-53.5 (1982)).

¹¹¹Act of Feb. 24, 1982, Pub. L. No. 84, 1982 Ind. Acts 804, 804-05 (codified at IND. CODE § 9-2-1-15 (1982)).

There is some skepticism among members of the insurance industry about the usefulness of these amendments. The first amendment may be useful in forcing more drivers to obtain insurance initially. However, nothing in the amendment prevents them from cancelling their insurance or letting it lapse once the registration is obtained. Although the Insurance Commissioner could arguably require companies to give notice to the Bureau of Motor Vehicles when an insured cancels or a policy lapses, such a requirement would be unworkable. The companies could not bear the expense of giving notice and the Bureau would probably be overburdened with the problems of enforcement.

The other two amendments may be no more effective. The second amendment will only be useful if police agencies and prosecutors are willing to prosecute. The third amendment to the financial responsibility laws will give only a small measure of added protection to drivers.

2. *Uninsured Motorist Coverage.*—The uninsured motorist coverage provision of Indiana statutory law¹¹² was completely repealed and rewritten during the 102d Indiana General Assembly's term.¹¹³ The revision does not significantly change the old statute,¹¹⁴ except that the law is now easier to read. The only major change is that the legislature has now included an option that allows for uninsured motorist *property* damage insurance.¹¹⁵ The new property coverage will apply only to damage to the automobile and personal property in it. The new coverage will not include loss of use of damaged or destroyed property.¹¹⁶ Also, there will be coverage only if the at-fault operator is identified.¹¹⁷

¹¹²IND. CODE § 27-7-5-1 (1976).

¹¹³Act of Feb. 24, 1982, Pub. L. No. 166, 1982 Ind. Acts 1237 (codified at IND. CODE §§ 27-7-5-2 to -6 (1982)).

¹¹⁴See IND. CODE § 27-7-5-1 (1976).

¹¹⁵See Act of Feb. 24, 1982, Pub. L. No. 166, 1982 Ind. Acts 1237, 1238-39 (codified at IND. CODE § 27-7-5 (1982)).

¹¹⁶IND. CODE § 27-7-5-3(b) (1982).

¹¹⁷*Id.* § 27-7-5-3(c).

X. Labor Law

EDWARD P. ARCHER*

A. Employment Contracts—Employment At Will

The most significant development in employer-employee relations in Indiana during the survey period may well have been the denial of transfer by the Indiana Supreme Court in *Campbell v. Eli Lilly & Co.*¹

Campbell had charged in his complaint that the company discharged him for reporting the lethal effects of various company-manufactured drugs to his superiors. Based upon the common law employment at will rule, the court of appeals held that Campbell's complaint did not state a claim upon which relief could be granted.² The court construed prior Indiana Supreme Court precedent³ as creating an exception to the employment at will rule only when the plaintiff demonstrates that he was discharged in retaliation for having exercised a statutorily conferred personal right or for having fulfilled a statutorily imposed duty.⁴ In *Campbell*, the court of appeals concluded that Campbell failed to show any statutory support for his actions.⁵

Justice Hunter wrote a strong dissent to the supreme court's denial of transfer, stating that he "would recognize an exception to the employment at will doctrine based on public policy."⁶ Justice Hunter noted that Campbell's actions "which allegedly prompted his discharge served a vital public interest defined by statute—the protection of the public from dangerous drugs."⁷ He noted the impact that the retaliatory discharge would have in frustrating this statutorily defined public policy and stated:

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¹421 N.E.2d 1099 (Ind. 1981).

²*Campbell v. Eli Lilly & Co.*, 413 N.E.2d 1054, 1062 (Ind. Ct. App. 1980). For a discussion of the appellate court's decision, see Galanti, *Business Associations, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 31, 54 (1982).

³*Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973). The Indiana Supreme Court created an exception to the employment at will doctrine for a claimant who alleged she was discharged for filing a workmen's compensation claim against her former employer.

⁴In *Frampton*, the court determined that the plaintiff had a statutory source for the right to assert the claim of wrongful discharge under IND. CODE § 22-3-2-15 (1976). *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 252, 297 N.E.2d 425, 428 (1973).

⁵413 N.E.2d at 1061.

⁶421 N.E.2d at 1100.

⁷*Id. See* 21 U.S.C. § 301-450 (1976 & Supp. IV 1980); IND. CODE §§ 16-1-28-1 to -31-10 (1982).

Our continued inflexible application of the [employment at will] rule, however, not only neuters the internal check which the aware employee inherently supplies, but also ultimately deprives the government of information concerning goods or conduct potentially injurious to the public welfare. It is these dubious ramifications which should not be countenanced, as well as the callous treatment which the rule permits to be foisted on the citizen who, in good faith, acts on the principle of civic duty or the mandates of a professional ethical code.⁸

In support of his proposed public policy exception to the employment at will rule, Justice Hunter cited authority from several other jurisdictions,⁹ from critics of an inflexible application of the employment at will rule,¹⁰ and from federal and Indiana statutes which exclude public employees from the scope of the employment at will rule.¹¹

Rather than religiously following the employment at will rule, Justice Hunter would balance employers' interests in conducting business efficiently with society's interest in effectuating public policies, and thus would only deny a cause of action "[w]here a discharged employee's claim does not rest on an employer's conduct in contravention of a clearly mandated public policy."¹²

Justice Hunter's dissent is compelling but unfortunately remains only a dissent. The *Campbell* case clearly establishes that the Indiana Supreme Court will not consider any statutorily defined public policy exceptions to the employment at will rule in Indiana. As Justice Hunter stated: "No more compelling example for such need exists than the circumstances alleged [in *Campbell*]."¹³

The court of appeals decision in *Stanley v. Kelley*¹⁴ illustrates the ramifications which flow from the employment at will rule. In *Stanley*, the court held that a contract of employment that is not for a definite and an enforceable term is a contract at will, and either party may terminate the employment at any time without cause.¹⁵ Further, the

⁸421 N.E.2d at 1101.

⁹E.g. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980).

¹⁰E.g. *Blades, Employment At Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty To Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

¹¹5 U.S.C. § 7503 (Supp. 1980); IND. CODE § 4-15-1-1 (1982).

¹²421 N.E.2d at 1102.

¹³*Id.* at 1103.

¹⁴422 N.E.2d 663 (Ind. Ct. App. 1981).

¹⁵*Id.* at 667.

court reasoned that such a "contract of employment is unenforceable with respect to that which remains executory."¹⁶

This much of the court's interpretation regarding employment at will is sound. However, the court went on to conclude that "[s]uch a contract, terminable at will, cannot form the basis of an action for interference with a contractual relationship."¹⁷ In footnote three, the court rejected Stanley's argument that the contract is a subsisting relationship of value until the contract is terminated.¹⁸ The court recognized that this argument was supported by Prosser and was accepted as the majority position in other jurisdictions; however, the court held that it did not appear to be the law in Indiana.¹⁹

The ramifications of this decision to employer-employee relations are obvious. If the court's interpretation is correct, there is no interference with contract protection for employment at will contracts under Indiana tort law. This seems to be an unjustifiably harsh result, which is contrary to the logic of the majority rule.

In *Ohio Table Pad Co. v. Hogan*,²⁰ the court of appeals held that Hogan's acts of moving and giving up a prior job to accept new employment did not constitute valid consideration so as to convert a terminable at will employment contract to a contract of permanent employment requiring "good cause" for discharge.²¹ The court reasoned,

that in moving and/or giving up her prior job, the employee is merely placing herself in a position to accept the new employment. There is no independent detriment to the employee because she would have had to do the same things in order to accept the job on any basis, and there is no independent benefit bestowed upon the employer.²²

This case is significant in that it recognized an exception to the employment at will rule under circumstances where additional consideration supports the employment contract; however, it is also significant that the court narrowly construed that exception.

¹⁶*Id.*

¹⁷*Id.* For further discussion of this case and the issue regarding the interference with a contractual relationship, see Mead, *Torts, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 377, 406 (1983).

¹⁸422 N.E.2d 667 n.3.

¹⁹*Id.* (citing *Miller v. Ortman*, 235 Ind. 641, 136 N.E.2d 17 (1956)). See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 129, at 932 (4th ed. 1971).

²⁰424 N.E.2d 144 (Ind. Ct. App. 1981).

²¹*Id.* at 147.

²²*Id.* at 146.

B. Bargaining For Non-Teacher Public Employees

The efforts of the courts to establish bargaining rights for public employees that are not covered under the 1973 Certificated Educational Employee Bargaining Act (CEEBA)²³ continued during the past survey period.

In *Michigan City Area Schools v. Siddall*,²⁴ the city had adopted a voluntary policy for collective bargaining with its non-teaching employees that was expressly conditioned upon all members of the employees' organization being school employees and upon all negotiating representatives of the employees' organization being school employees or attorneys. The non-teaching employees sought to be represented by an employee of the Indiana State Teachers' Association who was neither a school employee nor an attorney. When the school refused to recognize and to negotiate with the selected representative, a strike ensued. The school sought to enjoin the strike, and the employees counterclaimed to restrain the school from interfering with their choice of a bargaining representative.

The trial court permanently enjoined the employees from participating in the strike and ordered that the school bargain with the employees' selected representative. The only issue on appeal was the validity of the trial court's order restraining the school from interfering with the choice of a bargaining representative and mandating that the school bargain collectively. The court of appeals, while sustaining the injunction, overturned the trial court's order, holding that the school had no legal duty to bargain collectively.²⁵ The court noted that under common law there is no duty for employees and employers to engage in collective bargaining,²⁶ that the non-teacher employees were not under CEEBA,²⁷ and that the School Powers Act²⁸ authorized the school to fix the salaries and the compensation of its employees.

The court of appeals considered the employee's constitutional right to join a labor organization but concluded that there was no duty imposed upon the school to deal with such an organization or its representatives.²⁹ The court reasoned:

If there is no legal obligation statutorily or at common law to engage in good faith collective bargaining with a duly chosen agent of a group of employees, there is no *illegal* interference with an employee's constitutional freedom of speech or associa-

²³IND. CODE §§ 20-7.5-1-1 to -14 (1982).

²⁴427 N.E.2d 464 (Ind. Ct. App. 1981).

²⁵*Id.* at 466.

²⁶See *County Dep't of Public Welfare v. American Fed'n of State, County and Mun. Employees*, 416 N.E.2d 153 (Ind. Ct. App. 1981).

²⁷IND. CODE §§ 20-7.5-1-1 to -14 (1982).

²⁸*Id.* § 20-5-2-2(7).

²⁹427 N.E.2d at 466-67.

tion where an employer does no more than refuse to recognize and engage in collective bargaining with some employee selected organization or its agents.³⁰

The appellate court adopted the holding in *Peters v. Poor Sisters of Saint Francis Seraph*³¹ in which that court, following Professor Getman's analysis in his article dealing with Indiana Labor Relations Law,³² held that Indiana Code section 22-7-1-2,³³ which established a worker's right to select his bargaining representative and to organize into a local union, does not impose upon an employer a duty to recognize the union as the collective bargaining agent nor does it impose upon an employer a duty to engage in the collective bargaining process.³⁴

After determining that the school had no legal duty to engage in collective bargaining, the court addressed the impact of the school's policy statement. The court concluded that the school may voluntarily engage in collective bargaining and, in so doing, could impose qualifications and restrictions on its participation in collective bargaining.³⁵ The court reasoned that because "the classified employees did not comply with the policy conditions, there was no enforceable duty requiring the school to engage in collective bargaining."³⁶ Further, the court found that there was no evidence of "illegal interference" with the employees' selection of a bargaining representative.³⁷

Judge Staton noted in his concurring opinion that in this case "the school board had no statutory, common law or contractual duty to enter negotiations"³⁸ and stated that "the school board's 'voluntary policy for collective bargaining,' as characterized by the majority, was nothing more than an offer to bargain with the employees if the employees met the two conditions set by the policy."³⁹

³⁰*Id.* at 467.

³¹148 Ind. App. 453, 267 N.E.2d 558 (1971).

³²Getman, *Indiana Labor Relations Law: The Case for a State Labor Relations Act*, 42 IND. L.J. 77, 87 (1966).

³³IND. CODE § 22-7-1-2 (1982) provides that:

No worker or group of workers who have a legal residence in the state of Indiana shall be denied the right to select his or their bargaining representative in this state, or be denied the right to organize into a local union or association to exist within and pursuant to the laws of the state of Indiana: Provided, That this act shall in no way be deemed to amend or repeal any of the provisions of the National Labor Relations Act.

Id.

³⁴427 N.E.2d at 467 (citing *Peters v. Poor Sisters of Saint Francis Seraph*, 148 Ind. App. 453, 267 N.E.2d 558 (1971)).

³⁵427 N.E.2d at 468.

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

³⁹*Id.* at 469.

It is difficult to dispute the court's reasoning. However, *Siddall* leaves open the question of whether the school policy would have been enforceable had the employees complied with its conditions,⁴⁰ and the broader question of what circumstances would result in a contractual commitment to bargain. Other questions left unresolved by this decision include: what consideration would be required; what would be the duration of the commitment; and what would be required to comply with the contractual commitment — would the court assume the role of compelling good faith bargaining. These questions await further litigation.

C. Arbitration Appeals

1. *Private Employer Arbitration Cases.*—The only private-sector arbitration case resolved on appeal during the survey period was *International Brotherhood of Electrical Workers, Local 1400 v. Citizens Gas & Coke Utility*.⁴¹

Citizens Gas posted an opening for a trainee position as a machinery repairman and ultimately awarded the position to the least senior of four applicants. One of the senior applicants filed a grievance and the grievance went to arbitration. The arbitrator found that the company had unreasonably determined that the grievant was unqualified for the position and ordered that the grievant be placed in the trainee position and made whole for his losses. The arbitrator's decision was based upon the company's requirement of a high school diploma which the grievant did not have. The arbitrator noted that the company had waived the diploma requirement in the past for applicants who were otherwise qualified, but the company had failed to do so here because it felt a high school diploma was essential to a trainee position. The arbitrator recognized that the company had wide discretion in establishing job requirements but held that the requirements had to be reasonable. The arbitrator concluded that the diploma requirement was unreasonable because in some school systems a diploma had become little more than a certificate of attendance.

The court of appeals upheld the trial court's decision to vacate the award of the arbitrator.⁴² The appellate court recognized that, under the Uniform Arbitration Act, a court may review the substance of an award only when a party claims that the arbitrator has exceeded his power and the "award cannot be corrected without affecting the

⁴⁰For a discussion of this issue, see *County Dep't of Pub. Welfare v. AFSCME*, 416 N.E.2d 153 (Ind. Ct. App. 1981) and the author's comment relating to that case in *Archer, Labor Law, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 269, 273-77 (1982) [hereinafter cited as 1981 *Labor Law Survey*].

⁴¹428 N.E.2d 1320 (Ind. Ct. App. 1981).

⁴²*Id.* at 1327.

merits of the decisions upon the controversy submitted.' "⁴³ The court concluded, however, that the arbitrator's decision exceeded his authority which was controlled by the parties' collective bargaining agreement.⁴⁴

In his decision, the arbitrator had acknowledged that the trainee's position required a high school diploma and had admitted that the grievant did not meet that requirement, which was specified in the job description.⁴⁵ Yet in resolving this dispute, the arbitrator looked beyond the express job requirements and considered the reasonableness of those requirements.

The collective bargaining agreement permitted grievances to be filed challenging the reasonableness of job requirements; however, the high school diploma requirement had not been challenged when it was adopted, as required by the bargaining agreement. The court of appeals concluded from the thirty-day time limit for filing such a grievance set forth in the bargaining agreement, that this procedure was the exclusive remedy for challenging the reasonableness of job requirements and that job descriptions were to be deemed final if not challenged promptly when adopted.⁴⁶ Thus, when the arbitrator considered the reasonableness of the job requirement, he was acting beyond his powers and the court could vacate the arbitrator's award.

Because this was a private-sector case, Section 301 of the Labor Management Relations Act⁴⁷ and the cases construing that section are applicable. In 1960, the Supreme Court issued the *Steelworkers Trilogy* of cases⁴⁸ which provided clear instruction to the courts as to their role in enforcement of arbitration awards.⁴⁹ In *United Steelworkers of America v. American Manufacturing Co.*,⁵⁰ the Court stated:

The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is

⁴³*Id.* at 1325 (quoting the Uniform Arbitration Act, IND. CODE § 34-4-2-13(a) (1982)).

⁴⁴428 N.E.2d at 1326.

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷Labor Management Relations Act § 301, 29 U.S.C. § 185 (1976).

⁴⁸*United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

⁴⁹See *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960). In that case the Court stated that "when the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." *Id.* at 569.

⁵⁰363 U.S. 564 (1960).

governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.⁵¹

In the *Citizens Gas* case, the court construed the procedure for reviewing job requirements as stated in the collective bargaining agreement. Although the arbitrator was not confronted with the argument that this review procedure foreclosed him from passing on the reasonableness of the job requirements, the court construed that procedural contract language and applied it directly to the case. In so doing, the court rejected the union's procedural argument that the company had waived this argument by not having raised it to the arbitrator, despite the settled law that procedural objections to arbitrability are to be decided by the arbitrator and not by the courts.⁵²

The decision of the court as to the interpretation and application of the collective bargaining agreement may be sound; however, the case stands as a poor precedent. The court has decided questions which should have been presented to the arbitrator. At the very least, the court should have remanded the proceeding to the arbitrator for his resolution of the impact of the job requirement grievance procedure on the instant case and his resolution of whether that issue had been waived when it was not presented in the arbitrative hearing. The parties' past practice regarding these matters, the parties' bargaining history, and the vast body of arbitration case law,⁵³ should have been considered in addressing these questions.

It is difficult for this author, who is a labor arbitrator (though not the arbitrator in this case), to be in the position of advising the courts to restrict their judicial review of arbitration awards to comply with the Supreme Court directives in the *Steelworkers Trilogy*. Nonetheless, if the courts succumb to the temptation to review the merits of arbitrator's interpretative decisions, the process of arbitration will fail. To be viable, arbitration must afford the parties what they sought when they agreed to arbitration—a relatively inexpensive and speedy resolution of collective bargaining agreement disputes by an experienced arbitrator of their choosing. To superimpose the judicial system on arbitration cases, with its costly and slow moving appellate procedures, will destroy the arbitration system. The principal safeguard of the arbitration system is not judicial review, but the parties' right to select their own arbitrator.

⁵¹*Id.* at 567-68.

⁵²See *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964).

⁵³See, e.g., *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

2. *Public School Employer Arbitration Cases.*—In the arbitration appeals cases issued during the survey period, the court of appeals recognized that judicial review of an arbitrator's award must be limited in scope, but the court left numerous questions relating to those limits unanswered. In *School City of East Chicago v. East Chicago Federation of Teachers, Local 511*,⁵⁴ the court of appeals for the third district considered whether the school could challenge the correctness of the arbitrator's award after the statutorily set ninety-day period allowed for vacating, modifying, or correcting the award.⁵⁵ In addition, the court considered whether the reviewing court could intervene when the arbitrator has awarded punitive damages. The court of appeals concluded that the school could not directly challenge the arbitrator's award after the ninety-day period; however, the court of appeals allowed the school's collateral attack on the award of punitive damages and vacated the arbitrator's award.⁵⁶

In *East Chicago Federation*, the arbitrator held that the school employer had refused to make dues deductions and ordered the school to pay punitive damages to the union. More than ninety days after the award was mailed to the parties, the union filed a motion in trial court to confirm and enforce the award. The school employer answered, attacking the correctness of the arbitrator's decision. The trial court held that the school was precluded from raising, as a defense, the correctness of the arbitration award, because the school had not complied with the provisions of the Indiana Uniform Arbitration Act which required a party to file a challenge to an award within ninety days.⁵⁷

The issue, as the court of appeals perceived it, was whether the school employer was barred from challenging the correctness of the arbitrator's award because it failed to move for a vacation, modification, or correction of the award within the ninety-day period.

The court, finding no case law interpreting the Certificated Educa-

⁵⁴422 N.E.2d 656 (Ind. Ct. App. 1981).

⁵⁵See IND. CODE §§ 34-4-2-13, -14 (1982).

⁵⁶422 N.E.2d at 661-63.

⁵⁷Section 12 of the Uniform Arbitration Act (UAA) adopted by Indiana provides: Upon application of a party, but not before ninety (90) days after the mailing of a copy of the award to the parties, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 13 and 14 [34-4-2-13, 34-4-2-14] of this act. Upon confirmation, the court shall enter a judgment consistent with the award and cause such entry to be docketed as if rendered in an action in said court. IND. CODE § 34-4-2-12 (1982).

Sections 13 and 14 of the UAA provide for vacating an award and for modifying or correcting an award respectively; furthermore, both of those sections provide that applications for relief "shall be made within ninety (90) days after the mailing of a copy of the award to the applicant." *Id.* §§ 34-4-2-13, -14.

tional Employees Bargaining Act (CEEBA), looked to case law based upon the National Labor Relations Act (NLRA).⁵⁸ The court found that the legal precedent and federal policies on this issue would require the court to conclude that the school's defenses in *East Chicago Federation* were not timely asserted.⁵⁹ However, the court in *East Chicago Federation* stated that this precedent was not binding because the employer in this case, the school, was not subject to the NLRA.⁶⁰

Although the court of appeals noted that the school was not subject to the NLRA, and further noted a distinction between the employee's relationship with private employers and the school corporation, the court held that the Indiana statutes preclude the assertion of any defense that is available for direct appeal after the ninety-day period.⁶¹ In reaching this conclusion, the court found that the public policy to avoid labor strife, which supports the NLRA precedent on this issue, was applicable to this case.⁶² It is interesting to note that the court of appeals did not consider a recent Indiana decision, *State Department of Administration v. Sights*,⁶³ in which the court had ruled that a "defendant who has a valid ground for challenging the award but who fails to raise that challenge within the 90-day time limit should

⁵⁸29 U.S.C. § 151 (1976).

⁵⁹422 N.E.2d at 659-60 (citing *Chauffeurs, Teamsters, Warehousemen and Helpers v. Jefferson Trucking Co.*, 628 F.2d 1023 (7th Cir. 1980)). For further discussion of *Jefferson Trucking*, see 1981 *Labor Law Survey*, *supra* note 40, at 283-84. The conclusion in *Jefferson Trucking* may be inconsistent with the ultimate holding in the *Chicago Federation* case. As is developed more fully in the text of the 1981 Survey Article, the court in *Jefferson Trucking* based its decision on a finding that an arbitrator's error of law, under which the arbitrator grants a form of relief that public policy does not permit, renders the award void and subject to attack after the UAA 90-day period. The trial court opinion in *Chauffeurs, Teamsters, Warehousemen and Helpers v. Jefferson Trucking Co.*, 473 F. Supp. 1255 (S.D. Ind. 1979) notes that one of the defenses belatedly raised in that case was that the relief sought was not available at law. It is not clear whether this relief was one that public policy would not permit. If not, the seventh circuit was not called upon in *Jefferson Trucking* to address the narrow question the court dealt with in the *Chicago Federation* case.

⁶⁰See 29 U.S.C. § 152(2) (1976).

⁶¹422 N.E.2d at 660-61.

⁶²*Id.* at 661. The court stated that:

We must, however, agree with Judge Steckler in *Jefferson Trucking Company* that the policies favoring arbitration are firmly aligned against permitting a party, who has voluntarily agreed to this form of dispute settlement, [arbitration] . . . [could not] simply ignore an award that has been made and then ask to be given its day in court when, in frustration, the other party is driven to institute suit for enforcement of the award.

Id.

⁶³416 N.E.2d 455 (Ind. Ct. App. 1981), discussed in 1981 *Labor Law Survey*, *supra* note 40, at 282-83. In *Sights*, the arbitrator construed a statute so as to award the teachers back pay. The defendants alleged that the arbitrator erred in his construction of the statute and noted subsequent arbitrator's decisions in support of this con-

not be permitted to raise that challenge when the plaintiff applies for confirmation of his award.”⁶⁴

The court next considered the school’s collateral attack, claiming that the arbitrator’s award of punitive damages so exceeded the arbitrator’s authority as to be void. The court noted the general rule that an arbitrator’s award will not be vitiated because of legal errors but then listed three choices available to a reviewing court if an arbitrator does not follow the law. According to the court, the three choices include: disregarding the error because it is within the authority of the arbitrator; considering the error because it is the basis for a direct attack to vacate or modify the award; or voiding the award because it is beyond the jurisdiction of the arbitrator.⁶⁵ The court explained:

Which choice should be made depends upon the nature of the error. Since many errors will fall into the category of not being grounds for any modification of the award, it follows that some public policy element must be brought to bear before an error can be “promoted” into the second category. What then may constitute the third category, that [sic] at issue in the school’s claim before us?

Having surveyed the authorities we conclude that where the arbitrator has jurisdiction of the case and of the parties it is only where he affords a form of relief that public policy does not permit the parties to voluntarily agree to, that he so acts beyond his jurisdiction that the award is void and subject to collateral attack.⁶⁶

The court in *East Chicago Federation* chose the third category and found that the arbitrator’s award of punitive damages was beyond his jurisdiction, thus the award was void.⁶⁷

In reaching this conclusion, the court cited the decision of the New York Court of Appeals in *Garrity v. Lyle Stuart, Inc.*,⁶⁸ in which the court held that an arbitrator had no power to award punitive damages, even though it was agreed to by the parties, because the award of punitive damages is a sanction reserved to the state. The *Garrity* court concluded that the enforcement of an award of punitive damages would violate strong public policy considerations because it would be both

tention. Again, however, it is not clear that the arbitrator’s award in *Sightes* was one that public policy would not permit.

⁶⁴416 N.E.2d at 450.

⁶⁵422 N.E.2d at 662.

⁶⁶*Id.*

⁶⁷*Id.* at 662-63.

⁶⁸40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976).

unpredictable and uncontrollable and because it would amount to an unlimited draft upon judicial power.⁶⁹ However, *Garrity* was a commercial arbitration case, not a labor case, and the court made no reference to the Uniform Arbitration Act.

An additional authority cited in *East Chicago Federation* was a 1963 law review article⁷⁰ in which the author criticized a New York decision that failed to enforce an arbitrator's award of punitive damages against a union. The author stated that labor arbitration cases require a different treatment than commercial arbitration cases because labor arbitration is a necessary complement to negotiation and a substitute for industrial strife.⁷¹

A strong argument can be made that, especially in the absence of contractual authority to award punitive damages, an arbitrator does not have authority to award punitive damages. However, doubt creeps in regarding the decision in *East Chicago Federation* because the court, with little authority or explanation of its decision, permitted an arbitrator's punitive damages award to be challenged after the expiration of the statutory ninety-day period.

This case is significant in many respects. The court noted a distinction between employers who are subject to the NLRA and employers who are not subject to the NLRA. The court acknowledged that for the former employers precedent would dictate that the defenses in this case were not timely filed.⁷² As to employers not under the NLRA, the court appears to have created some exceptions to the general rule that errors of law do not afford a basis for attacking an arbitrator's award.

The exceptions created in *East Chicago Federation* were cited with approval in *Southwest Parke Education Association v. Southwest Parke Community School Trustee's Corp.*⁷³ In *Southwest Parke*, the court of appeals for the first district held that the Indiana Uniform Arbitration Act,⁷⁴ as a general rule, does not permit an arbitrator's award to be vacated for an erroneous interpretation of law.⁷⁵

⁶⁹*Id.* at 358, 353 N.E.2d at 795-96, 386 N.Y.S.2d at 833-34.

⁷⁰Note, *Judicial Review of Arbitration: The Role of Public Policy*, 58 Nw. U. L. REV. 545 (1963).

⁷¹*Id.* at 551-55. The case was *Publisher's Ass'n v. Newspaper & Mail Deliverers' Union*, 280 A.D. 500, 114 N.Y.S. 401 (1952). The court in *Publisher's Association* refused enforcement of the arbitrator's award of punitive damages despite the parties' collective bargaining agreement in which they agreed to punitive damages. This case is criticized in Fleming, *Arbitrators and the Remedy Power*, 48 VA. L. REV. 1199, 1209 (1962).

⁷²422 N.E.2d at 660 (citing *Chauffeurs, Teamsters, Warehousemen and Helpers v. Jefferson Trucking Co.*, 628 F.2d 1023 (7th Cir. 1980)).

⁷³427 N.E.2d 1140 (Ind. Ct. App. 1981).

⁷⁴IND. CODE §§ 34-4-2-1 to -22 (1982).

⁷⁵427 N.E.2d at 1148.

In *Southwest Parke*, the arbitrator had held that the school board's dismissal of the grievant teacher was invalid under the Indiana General School Powers Act⁷⁶ because the school board had voted to dismiss the teacher by only a majority of those present and not a majority of the school board. The arbitrator construed the Act to require the majority vote of the school board for such action.

The court of appeals concluded that if the arbitrator committed an error of law in his construction of the Act, it had to fall in the first two of the three exceptions set forth in *East Chicago Federation* because the trial court, in vacating the original award, found the arbitrator's interpretation of the law, rather than the relief granted, to be faulty.⁷⁷ The court of appeals stated that under the Uniform Arbitration Act the general rule is that "an arbitrator's mistake of law or erroneous interpretation of the law does not constitute an act in excess of the arbitrator's powers."⁷⁸ However, the court noted that there are exceptions to this general rule for an arbitrator's manifest disregard of the law or gross errors of judgment in law.⁷⁹ The court concluded that neither of these exceptions applied to the instant case because the "arbitrator's findings, opinion, and award indicate[d] not only a knowledge of the applicable law and facts, but also a conscientious attempt to apply the law to the facts."⁸⁰ Thus, without ever deciding if the arbitrator had erred in his interpretation of the General School Powers Act, the court of appeals upheld the arbitrator's award requiring reinstatement of the grievant teacher with reimbursement for lost earnings.⁸¹

To be compared to *Southwest Parke* is *Tippecanoe Education Association v. Board of School Trustees*,⁸² in which the holding of the court of appeals conflicts with CEEBA. In *Tippecanoe*, the grievant high school teacher, who taught physical education, had been transferred involuntarily by the school board to a similar position in the junior high school. The reason for the transfer was to create a physical

⁷⁶Indiana General School Powers Act, IND. CODE § 20-5-3-2(6) (1982) provides: Quorum. At a meeting of the governing body, a majority of the members shall constitute a quorum. No action may be taken unless a quorum is present. Except where a larger vote is required by law with respect to any matter, a majority of the members present may adopt a resolution or take any action.

Id.

⁷⁷427 N.E.2d at 1147 (construing *School City of East Chicago v. East Chicago Fed'n of Teachers, Local 511*, 422 N.E.2d 656, 662 (Ind. Ct. App. 1981)).

⁷⁸427 N.E.2d at 1147. See IND. CODE § 34-4-2-13 (1982).

⁷⁹427 N.E.2d at 1147.

⁸⁰*Id.* at 1148.

⁸¹*Id.*

⁸²429 N.E.2d 967 (Ind. Ct. App. 1981).

education teaching position for the newly hired basketball coach at the high school. The school board felt that it was important for the coach to teach at the school where he was to coach. The school board contended that this transfer was made in compliance with its collective bargaining agreement which listed the criteria and the procedure to follow in transferring teachers, and further provided that: "*The Board reserves the right to make involuntary transfers for the general welfare of the corporation.*"⁸³

The arbitrator found that the board had followed the criteria and procedure set forth by the collective bargaining agreement in transferring the grievant, but the arbitrator construed the words "general welfare of the corporation" to refer to the school's best interest when viewed from the vantage point of the entire school corporation. The arbitrator reasoned that a basketball coach deals personally with a limited number of students and that his teaching assignment at the school where he coaches would help only the few players on his team. He thus concluded that the grievant teacher's right to continue in his teaching position at the high school was more in the "general welfare of the school corporation" than the assignment of the new coach to teaching duties at the school.

On appeal, the court considered whether the trial court had correctly concluded that the arbitrator exceeded his authority in determining the rights of the grievant teacher, by interpreting what was for the general welfare of the school. The court looked to section 6(b) of CEEBA which provides that:

School employers shall have the responsibility and authority to manage and direct in behalf of the public the operations and activities of the school corporation to the full extent authorized by law. Such responsibility and activity shall include but not be limited to the right of the school employer to . . . (3) hire, promote, demote, transfer, assign and retain employees.⁸⁴

In addition, the court considered section 3 of CEEBA, which in defining the "duty to bargain collectively" under the Act states, in part, that "[n]o contract may include provisions in conflict with . . . (c) school employer rights as defined in Section 6(b)."⁸⁵

In construing these provisions, the court relied upon a prior decision, *Anderson Federation of Teachers, Local 519 v. Alexander*,⁸⁶ where the court found that under CEEBA the school was limited in the scope

⁸³*Id.* at 969.

⁸⁴IND. CODE § 20-7.5-1-6(b) (1982).

⁸⁵*Id.* § 20-7.5-1-3.

⁸⁶416 N.E.2d 1327 (Ind. Ct. App. 1981). For a discussion of this case, see 1981 *Labor Law Survey*, *supra* note 40, at 269-73.

of its collective bargaining. The court in *Anderson Teachers* stated:

The scope of collective bargaining by schools, then, is to be restricted because school corporations have duties to the public, to the legislature, and to their employees as individuals, which they must not be permitted to bargain away.

....

.... the legislature has plainly expressed its intent that the responsibilities and authority of school corporations, as partially described in section 6(b) of the Act, are duties entrusted by the legislature to the sole discretion of school corporations, and can not be restricted in a collective bargaining agreement."⁸⁷

Applying the rationale in *Anderson Teachers*, the court of appeals found that the arbitrator's consideration of the general welfare of the school corporation created a conflict because such responsibility had been entrusted to the sole discretion of the school board; thus, the court held that the arbitrator's decision had been properly vacated.⁸⁸

This reasoning supports the court's action in vacating the arbitrator's award, and it is consistent with the general rule in *Southwest Parke* that an arbitrator's erroneous interpretation of law is not a sufficient reason to set aside the arbitrator's award.⁸⁹ In *Southwest Parke*, the arbitrator construed a state statute and, while he may have been in error, such error, in itself, would not be grounds to deny enforcement of the award under the general rule of the Uniform Arbitration Act. In *Tippecanoe*, the arbitrator did not construe the statute in question. There is no indication in the opinion of the court of appeals that the arbitrator was even made aware of the statute. While his award may have been based upon a correct interpretation of the parties' collective bargaining agreement, the agreement, as the court construed it, was beyond the authority of the parties. In effect, the court in *Tippecanoe* found that the agreement was unenforceable as contrary to the public policy expressed by the legislature in CEEBA.⁹⁰

If the court had said nothing more on this point, it would seem that any collective bargaining agreement relating to school employer rights under section 6(b) of CEEBA would be unenforceable. However, the court went on to narrow its holding by stating:

It is apparent, however, [that] the arbitrator may intervene where the Board's action conflicts with applicable law or express, lawful Master Contract provisions, and that the Board

⁸⁷416 N.E.2d at 1331-32.

⁸⁸429 N.E.2d at 973.

⁸⁹See 427 N.E.2d at 1147.

⁹⁰429 N.E.2d at 971.

is required to observe the procedures and criteria specified . . . [in the agreement] in making transfers. Though the arbitrator may not generally substitute his judgment for that of the Board, we believe appropriate review will lie in a proper case for actions involving purely arbitrary, capricious or fraudulent exercise of the powers granted to the Board by the General School Powers Act.⁹¹

This interpretation considerably softens the literal language of sections 3 and 6(b) of CEEBA as it allows arbitrator enforcement of the parties' agreements with respect to the criteria and the procedure for school employer exercise of CEEBA section 6(b) powers, and this interpretation permits arbitrator review of arbitrary, capricious or fraudulent exercises of such powers.

After *Southwest Parke* and *Tippecanoe*, questions still remain as to the circumstances under which the exceptions stated in *East Chicago Federation* will be applied by the courts in reviewing arbitration decisions. The first "choice" that the court in *East Chicago Federation* lists encompasses the general rule that the court will disregard the error by the arbitrator.⁹² The second "choice" for a court is to permit a direct attack on the award within the ninety-day statutory period.⁹³ In *East Chicago Federation*, the court noted that this second category involves public policy considerations and included in footnote thirteen, authority recognizing an exception for an arbitrator's "manifest disregard of the law."⁹⁴ No one can take issue with a court having authority to set aside an award based upon an arbitrator's "manifest disregard of the law." But does this constitute the only circumstance which would permit a direct attack based upon an arbitrator's error of law?

Finally the *East Chicago Federation* court stated that in the third "choice," the "only" circumstance under which it will void the award as being beyond the arbitrator's jurisdiction is where the arbitrator "affords a form of relief that public policy does not permit the parties to voluntarily agree to."⁹⁵ *East Chicago Federation* involved punitive damages. What other forms of relief would fall within this third category? Would an arbitrator's award based upon an incorrect interpretation of CEEBA section 6(b) or an interpretation in conflict with that section, such as in *Tippecanoe*, fall within this third category, or would such defenses have to be raised within the ninety-day period? These questions also will have to await further litigation.

⁹¹*Id.* at 973 (citation omitted).

⁹²422 N.E.2d at 662.

⁹³*Id.*

⁹⁴*Id.* at 662 n.13 (citing *San Martine Compania de Navegacion v. Saguenay Terminals, Ltd.*, 293 F.2d 796 (9th Cir. 1961)).

⁹⁵422 N.E.2d at 662.

XI. Products Liability

JORDAN H. LEIBMAN*

A. Introduction

A dominant theme running through the three major appellate court products liability cases decided during the survey period is that of proximate, intervening, and superseding causation. In *Craven v. Niagra Machine & Tool Works, Inc.*,¹ the Indiana Court of Appeals, in a petition for rehearing, reasserted the principle that a product manufacturer has a duty to foresee and anticipate subsequent, substantial changes of its product by others. However, the plaintiff has the burden of showing that any such change was not a superseding cause of his injuries.² In *Conder v. Hull Lift Truck, Inc.*,³ the Indiana Supreme Court acknowledged that foreseeability principles, to be applied by the trier of fact, will determine whether intervening acts, including product misuse, supersede the act of the manufacturer in introducing a defective product into the stream of commerce.⁴ And finally, in *Bemis Co. v. Rubush*,⁵ the Indiana Supreme Court, in a controversial reversal, ruled that the issue of causation need not be reached if the instrumentality causing the injury presented an open and obvious danger which would be apparent to an ordinary product user.⁶

B. Substantial Change

*Craven v. Niagra Machine & Tool Works, Inc.*⁷ was an appeal from judgment on the evidence in favor of the defendant manufacturer,

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¹425 N.E.2d 654 (Ind. Ct. App. 1981), *rev'd on rehearing* 417 N.E.2d 1165 (Ind. Ct. App. 1981). See Vargo, *Products Liability*, 1981 *Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 289, 301 (1982) for a discussion of the original court of appeals opinion.

²425 N.E.2d at 655-56.

³435 N.E.2d 10 (Ind. 1982), *rev'd* 405 N.E.2d 538 (Ind. Ct. App. 1980). See Leibman, *Products Liability*, 1980 *Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 1, 25-27, 31, 43-45, 60-61, 64 (1981) for a discussion of the issues raised in the Indiana Court of Appeals opinion in *Conder*.

⁴435 N.E.2d at 14.

⁵427 N.E.2d 1058 (Ind. 1982), *rev'd* 401 N.E.2d 48 (Ind. Ct. App. 1980). See Leibman, *Products Liability*, 1980 *Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 1, 8-17, 30, 40, 58, 61-62, 64 (1981) for a discussion of the issues raised in the Indiana Court of Appeals opinion in *Bemis*. See also, Phillips, *Products Liability: Obviousness of Danger Revisited*, 15 IND. L. REV. 797 (1982).

⁶427 N.E.2d at 1061.

⁷417 N.E.2d 1165 (Ind. Ct. App. 1981).

Niagra.⁸ Craven's claim, based on strict liability in tort,⁹ alleged that Niagra failed to adequately warn of inherent dangers in its product, a punch press, with respect to an operator "trying out" small dies without first blocking the slide with safety blocks.¹⁰ By virtue of that failure to adequately warn, the plaintiff contended that the manufacturer had introduced a defective product into the stream of commerce and that the defect was the proximate cause of his injuries.¹¹

The court of appeals, in its original hearing, ruled that there was sufficient evidence of a latent defect to create a question of fact for the jury;¹² that is, was the punch press "in a defective condition unreasonably dangerous,"¹³ which would then create a duty to warn. In discussing whether the alleged failure to give an adequate warning could be a cause in fact of the injury, the court noted that there was a presumption in Craven's favor that Niagra's warnings, in the form of a service bulletin to the original purchaser of the press, were inadequate because Craven had failed to heed them.¹⁴ "In reference to cause in fact, there is a rebuttable presumption that adequate warnings will be heeded.¹⁵ . . . Where warnings are inadequate, the presumption is in essence a presumption of causation."¹⁶ Niagra presented evidence of warning adequacy to rebut the presumption. However, Craven testified that he would have heeded a different type of warning, that he did take precautions when he recognized a danger with heavy dies, and that he heeded warnings in regard to other machines.¹⁷ The court found that this testimony, along with testimony

⁸*Id.* at 1168.

⁹The strict liability claim was based on section 402A of the *Restatement (Second) of Torts* which states:

Special Liability of Seller of Product for Physical Harm to User or Consumer.
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold. (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

¹⁰417 N.E.2d at 1169-70.

¹¹*Id.*

¹²*Id.* at 1170.

¹³RESTATEMENT (SECOND) OF TORTS § 402A (1965). See *supra* note 9.

¹⁴417 N.E.2d at 1171.

¹⁵*Id.* (citing *Conder v. Hull Lift Truck, Inc.*, 405 N.E.2d 538 (Ind. Ct. App. 1980)).

¹⁶417 N.E.2d at 1171 (citing *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541 (Ind. Ct. App. 1979)).

¹⁷417 N.E.2d at 1171.

by Craven's peers as to his cautious nature, was sufficient to create a jury question on the issue of cause in fact.¹⁸

To establish a jury question with respect to proximate cause, however, the court held that foreseeability principles would be the ultimate test.¹⁹ Finding that Niagra was aware or should have been aware of the frequent resellings and the frequent misuses of its products and the products' safety features, the appellate court ruled that Niagra might reasonably foresee that the warning system it employed would prove inadequate.²⁰ Therefore, an issue of proximate cause existed which could go to a jury. With defect, causation, and damages at issue, judgment on the evidence was inappropriate.²¹ Consequently, the court of appeals reversed and remanded for a new trial.²²

In its petition for rehearing, Niagra argued that the court of appeals had "incorrectly decided the questions regarding substantial change and causation when [it] held that substantial change in the product after sale is a question of foreseeable or unforeseeable intervening, superseding cause."²³ Even if foreseeability of subsequent change is required of manufacturers, Niagra argued, the question remained whether the plaintiff or the defendant had the burden of proving or disproving that substantial product change, after the product leaves the manufacturer's control, was the sole proximate cause of injury.²⁴

The problem of substantial change is derived from section 402A(1)(b) of the *Restatement (Second) of Torts*, which provides that the product "reach the user or consumer without substantial change in the condition in which it is sold."²⁵ Comment p to this section²⁶ explains why section 402A only addresses unreasonably dangerous defects in substantially *unchanged* products. The American Law Institute had insufficient case law in 1965 to fashion a rule which would determine which changes would provide adequate grounds for finding superseding, intervening causes.²⁷ Comment p makes it clear, however,

¹⁸*Id.*

¹⁹*Id.* at 1170.

²⁰*Id.* at 1171.

²¹*Id.*

²²*Id.* at 1172.

²³425 N.E.2d 654, 655 (Ind. Ct. App. 1981).

²⁴*Id.* at 655-56.

²⁵RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965).

²⁶RESTATEMENT (SECOND) OF TORTS § 402A comment p (1965).

²⁷*Id.* Comment p provides in pertinent part:

Thus far the decisions applying the rule stated have not gone beyond products which are sold in the condition, or in substantially the same condition, in which they are expected to reach the hands of the ultimate user or consumer. In the absence of decisions providing a clue to the rules which are likely to develop, the Institute has refrained from taking any position as to the possible liability of the seller where the product is expected to, and does,

that the "mere fact that the product is to undergo processing, or other substantial change, will not in all cases relieve the seller of liability."²⁸ The comment provides a series of examples which focus on two criteria. The first is whether the original defect or the subsequent change was a cause in fact of the injury.²⁹ If the subsequent change or processing had no effect on the injury, then the liability of the original actor certainly should carry through. The second criterion is whether a transfer of responsibility to a subsequent processor has taken place. It is in this criterion that foreseeability principles can be found, and the language of comment p suggests that common law development might permit such a result. Examples given in the comment indicate that the likelihood of liability attaching to a manufacturer is a function of how certain the manufacturer might be of the ultimate use of its raw material which then leads to injury. The variety of uses the product has will determine how foreseeable that use was to the manufacturer and how foreseeable was the concomitant risk of harm. Clearly, the Institute left the decision of whether responsibility for foreseeable harm should remain with the original actor, or should be shifted wholly to the subsequent changer or processor, to state courts to sort out over time.³⁰

On rehearing, the appellate court ruled in *Craven*³¹ that Indiana case law had applied foreseeability principles to subsequent, substantial changes in products when Indiana adopted strict liability in tort.³² "Substantial change has been defined in Indiana as 'any change which increases the likelihood of a malfunction, which is the proximate cause of the harm complained of, and which is independent of the expected and intended use to which the product is put.'"³³ The *Craven* court ruled that this definition permitted the original actor to be held strictly liable "if it is foreseeable that the alteration would be made and the change does not unreasonably render the product unsafe."³⁴

undergo further processing or other substantial change after it leaves his hands and before it reaches those of the ultimate user or consumer.

Id.

²⁸RESTATEMENT (SECOND) OF TORTS § 402A comment p (1965).

²⁹*Id.*

³⁰*Id.* Comment p provides in pertinent part:

No doubt there will be some situations, and some defects, as to which responsibility will be shifted, and others in which it will not. The existing decisions as yet throw no light upon the questions, and the Institute therefore expresses neither approval nor disapproval of the seller's strict liability in such a case.

Id.

³¹425 N.E.2d 654 (Ind. Ct. App. 1981).

³²Indiana first adopted strict liability in tort in *Cornette v. Searjeant Metal Products*, 147 Ind. App. 46, 258 N.E.2d 652 (1970).

³³425 N.E.2d at 655 (quoting 147 Ind. App. 46, 54, 258 N.E.2d 652, 657 (1970)).

³⁴425 N.E.2d at 655.

Craven had alleged a cognizable defect in the failure to adequately warn of the danger of not using safety blocks and had established a question of cause in fact, in that but for the lack of adequate warning he would not have been injured. The court on rehearing, however, decided that he had failed to meet his burden of making out a *prima facie* case because he had failed to establish that the lack of warning was a *proximate cause* of injury.³⁵ Craven failed to present sufficient evidence that the subsequent changes made by third parties, after Niagra had sold the punch press, were not superseding, intervening, efficient causes of his injury. "By definition, plaintiff must offer evidence that the changes did not increase the danger in not using safety blocks or the likelihood of the ram falling which caused the injury and that the changes could have been reasonably expected, i.e., foreseeable."³⁶ Without this proof the "only reasonable inference would be that this risk of the ram falling, creating the unreasonable danger in not using safety blocks, developed sometime after it left the hands of the manufacturer"³⁷

In summary, in affirming the trial court judgment for Niagra, the appellate court ruled that, while a manufacturer must anticipate substantial changes which are reasonably foreseeable, the issue of substantial change is not a defense. Rather, proving the *lack of substantial change* is properly part of the plaintiff's case-in-chief.

C. Product Misuse and Substantial Change as Intervening Causation

To understand the dilemma presented to the Indiana Supreme Court by the appellate court's decision in *Conder v. Hull Lift Truck, Inc.*,³⁸ a review of the facts in chronological order will be useful.³⁹ Allis-Chalmers Corporation manufactured a forklift truck and sold it to Hull Lift Truck, Inc., which was in the business of leasing material handling equipment to industrial and commercial companies. Hull leased the Allis-Chalmers forklift to Globemaster for use on the Globemaster receiving dock which was under the supervision of Leroy Graber, the receiving foreman. Plaintiff Raymond Conder, a Globemaster employee and a forklift truck operator, reported to Graber. Hull was responsible for all maintenance and adjustments to the leased equipment, including the Allis-Chalmers' forklift truck.

³⁵*Id.*

³⁶*Id.* at 655-56.

³⁷*Id.* at 656.

³⁸405 N.E.2d 538 (Ind. Ct. App. 1980), *aff'd in part, rev'd in part*, 435 N.E.2d 10 (Ind. 1982).

³⁹The facts of *Conder* are presented in a somewhat different sequence in 405 N.E.2d at 541.

At some point after Globemaster took possession of the forklift, Graber and two forklift truck operators, other than Conder, became aware that there was an over-acceleration problem with the machine.⁴⁰ However, Graber decided to delay any maintenance on the forklift because the receiving department was exceptionally busy. Graber not only failed to call Hull and request maintenance for the forklift, but he also failed to warn Conder of the forklift's problem of over-acceleration.⁴¹ Conder was injured severely when the machine, failing to decelerate for him, overturned as it passed through a puddle of water.

Conder and his wife brought suit against Allis-Chalmers, the manufacturer, "based upon theories of strict liability, negligence and willful and/or wanton misconduct,"⁴² and they sued Hull Lift Truck, Inc. under both strict liability and negligence theories.⁴³ This Survey will discuss only the strict liability claims.⁴⁴ Conder's strict liability allegation against Allis-Chalmers stated that the product possessed both a design defect and a warning defect at the time Allis-Chalmers sold it to Hull.⁴⁵ The design of the forklift permitted "a foreseeable misadjustment of the governor linkage"⁴⁶ and Allis-Chalmers failed to warn of the misadjustment hazard.⁴⁷ With respect to the leasing agent Hull, the plaintiff "claimed the forklift truck was defective and unreasonably dangerous in that the torsion spring on the carburetor was either defective and/or broken when delivered to Globemaster, and the carburetor-governor linkage was grossly out of adjustment."⁴⁸

At trial, *both* defendants received favorable jury verdicts.⁴⁹ In their appeal of the verdict for Hull, Conder argued that the verdict was contrary to law because it was against the weight of the evidence.⁵⁰ In ruling that it could not reverse "unless the evidence is without

⁴⁰405 N.E.2d at 543.

⁴¹*Id.*

⁴²*Id.* at 541. The issue of willful and wanton misconduct was discussed in Leibman, *Products Liability, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 1, 60-61 (1981). Because this issue was not material to the supreme court reversal of *Conder* it will not be discussed in this article. Although Conder and his wife both brought suit, this article only discusses Raymond Conder's claim.

⁴³405 N.E.2d at 541-42.

⁴⁴Both the Indiana Court of Appeals and the Indiana Supreme Court decided *Conder* under strict liability principles.

⁴⁵405 N.E.2d at 541.

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸*Id.* at 541-42. The misadjustment of the forklift truck's carburetor-governor linkage was initially masked by the functioning of a torsion spring which, when working, prevented the truck from over accelerating. Apparently this additional safety device failed at some time after Hull leased the truck to Globemaster. *Id.* at 542.

⁴⁹*Id.* at 540.

⁵⁰*Id.* at 542.

conflict and leads to only one conclusion,"⁵¹ the court of appeals agreed that there was "overwhelming, uncontradicted evidence to prove the forklift's governor-carburetor linkage was misadjusted at the time the machine was leased to Globemaster. Therefore the forklift was clearly defective and unreasonably dangerous."⁵² Thus, the appellate court concluded that Hull had leased a defective product to Globemaster by virtue of the maladjustment, and "the maladjustment was a cause in fact of the plaintiff's accident."⁵³

Despite this conclusion, the court found that the jury had been presented with a question of fact on the issue of proximate cause.⁵⁴ The court ruled that the jury could have found that the defective product was not the proximate cause of Conder's injuries, but rather that the negligent acts and omissions of Globemaster's foreman were intervening, efficient, superseding causes of Conder's injuries.⁵⁵ The foreman's failure to remove the forklift from service or to warn Conder of the over-acceleration problem would then become the sole proximate cause of injury, while Hull's leasing an unreasonably dangerous product would become merely a remote cause of injury not subject to liability.⁵⁶ With respect to the action against Hull, the court did not discuss errors in the jury instructions or admissibility of evidence.

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Id.* at 543.

⁵⁶The Indiana rule governing causation is set out in *Ortho Pharmaceutical Corp. v. Chapman*, 388 N.E.2d 541, 555 (Ind. Ct. App. 1979) as follows:

Proximate cause is commonly defined as "that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which the result would not have occurred." *Johnson v. Bender*, (1977) Ind. App., 369 N.E.2d 936, 939. This latter language describes what is known as the "but-for" test. A fundamental element of proximate cause is that the injury or consequence of the wrongful act be of a class reasonably foreseeable at the time of that act. *Elder v. Fisher*, (1966) 247 Ind. 598, 217 N.E.2d 847; *Meadowlark Farms, Inc. v. Warken*, *supra*, [(1978) Ind. App., 376 N.E.2d 122]. The defendant's act need not be the sole proximate cause; many causes may influence a result. *Meadowlark Farms, Inc. v. Warken*, *supra*, 376 N.E.2d at 129. The question is whether "the original wrong was one of the proximate rather than remote causes." *Dreibelbis v. Bennett*, (1974) 162 Ind. App. 414, 319 N.E.2d 634, 638. Thus, "the ultimate test of legal proximate causation is the reasonable foreseeability. The assertion of an intervening, superceding [sic] cause fails to alter this test." *Id.* Rather, "[w]here harmful consequences are brought about by intervening independent forces the operation of which might have been reasonably foreseen, then the chain of causation extending from the original wrongful act to the injury is not broken by the intervening and independent forces and the original wrongful act is treated as a proximate cause." *New York Central R. Co. v. Cavinder*, (1965) 141 Ind. App. 42, 211 N.E.2d 502, 508. Proximate

In appealing the verdict in favor of Allis-Chalmers, Conder assigned error to several of the trial court's instructions and also to the trial court's refusal to give two instructions submitted by Conder.⁵⁷ The alleged erroneous instructions raised two basic issues. The first issue was whether a manufacturer is a guarantor in regard to the quality of its product. The second, and more significant issue, was the extent of the manufacturer's responsibility for anticipating subsequent acts of product misuse and product alteration by product users and third parties.

The "subsequent act" issue raised by Conder focused on the concept of foreseeability. Conder argued that one trial court instruction was an incomplete statement of the law regarding any substantial change made in a product after it leaves the manufacturer's hands because the jury was told "the manufacturer of a product is not required to anticipate or foresee that its product will be substantially changed."⁵⁸ The court of appeals acknowledged that foreseeability of substantial change was indeed a requirement of Indiana law, but it did not find the instruction erroneous because that requirement was amply dealt with in another instruction.⁵⁹

The court of appeals did find error in another instruction which told the jury that if "the plaintiff's own conduct was the sole proximate cause of the plaintiff's injuries, the verdict should be for Allis-Chalmers."⁶⁰ Although the court found that this instruction might be a correct but abstract statement of the law, it should not have been given because there was no evidence submitted that any act of Conder was a proximate cause of his injury. "The issues of causation in this case were difficult enough without this potentially misleading reference to the plaintiff's conduct."⁶¹ On the other hand, the court ruled that another instruction on intervening causation was proper because there was evidence that the Globemaster foreman's failure to have corrective service performed on the forklift and to warn Conder could have been an intervening cause.⁶²

cause is generally a question for the trier of fact.

Id. at 555. The court in *Conder* cited *Balido v. Improved Machinery, Inc.*, 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973) for the proposition that the question of intervening cause is for the jury. 405 N.E.2d at 543.

⁵⁷The alleged erroneous and refused instructions are listed in 405 N.E.2d at 540-41 and are discussed at 544-47.

⁵⁸405 N.E.2d at 544.

⁵⁹*Id.* Justice Hunter later pointed out in his dissent to the supreme court decision in *Conder*, "an improper instruction cannot necessarily be cured by the giving of a proper instruction, for the result leaves the jury to determine which of the contradictory propositions of law it should apply." 435 N.E.2d 10, 21 (Ind. 1982) (Hunter, J., dissenting).

⁶⁰405 N.E.2d at 545.

⁶¹*Id.*

⁶²*Id.*

The court of appeals appeared most disturbed, however, with an instruction submitted by Allis-Chalmers and given by the trial court "which told the jury Allis-Chalmers was not required to warn of dangers associated with the misuse of its product."⁶³ Nothing in this instruction told the jury that a manufacturer had a duty to foresee misuses in the ordinary use environment of the product and to warn the appropriate parties about the hazards arising out of foreseeable misuses. The court held that such a duty to foresee misuse was a requirement of Indiana law.⁶⁴ The court added that misuse is a defense only when the product is used in a manner not reasonably foreseeable.⁶⁵ The failure to instruct the jury that a manufacturer must foresee product misuse was held to be reversible error. Thus, the court remanded the action against Allis-Chalmers for a new trial and affirmed the judgment for Hull.⁶⁶

On petition for transfer, the supreme court had to consider the following problem. Presumably, the jury verdict for Hull, the leasing agent, was based solely on a jury finding that Globemaster's foreman, Leroy Graber, by his intervening acts of negligence, had produced an efficient and superseding cause of Conder's injuries. Conder had proven that Hull had delivered to Globemaster an unreasonably dangerous, defective product which defect was the cause in fact of his injuries.⁶⁷ Thus, only a finding of superseding causation could explain the verdict for Hull. If Graber's acts superseded Hull's acts, they should also have been held to supersede any defects introduced by Allis-Chalmers because Allis-Chalmers' introduction of the product was prior to both the actions of Graber and Hull. The supreme court recognized the force of this argument. "The position of Allis-Chalmers is well taken that the same unforeseeable intervening cause of Conder's accident that insulated Hull from liability also insulated Allis-Chalmers."⁶⁸

If Graber's negligence was a superseding cause of Conder's in-

⁶³*Id.*

⁶⁴*Id.* at 546.

⁶⁵*Id.* The court cited *Perfection Paint and Color Co. v. Konduris*, 147 Ind. App. 106, 258 N.E.2d 681 (1970) which incorporated Judge Sharp's definition of misuse from his concurring opinion in *Cornette v. Searjeant Metal Products*, 147 Ind. App. 46, 67, 258 N.E.2d 652, 665 (1970). In *Cornette*, the Indiana Court of Appeals adopted strict liability in tort for Indiana as set out in the *Restatement (Second) of Torts*. See *id.*

⁶⁶405 N.E.2d at 548. In addition to Allis-Chalmers' "misuse" instruction no. 10, the court found error in Allis-Chalmers' instruction no. 5 which stated that the manufacturer is not a guarantor of his product's quality, see *infra* notes 89-95 and accompanying text, and Allis-Chalmers' instruction no. 7 (misprinted at page 548 as no. 6) which dealt with plaintiff's conduct as the sole proximate cause of his injuries, see *supra* notes 60 & 61 and accompanying text. *Id.*

⁶⁷405 N.E.2d at 542. See *supra* note 52 and accompanying text.

⁶⁸435 N.E.2d 10, 15 (Ind. 1981).

juries, this possibility raised an additional question regarding the errors in instructions that the court of appeals had found. The supreme court ruled that the jury instructions regarding Allis-Chalmers, if in fact they were improper, were, at most, harmless error.⁶⁹ The important substantive question remaining for the supreme court was whether the instructions, especially the one with respect to foreseeable misuse, were, in fact, improper.

Although the early Indiana Court of Appeals cases, *Cornette v. Searjeant Metal Products*⁷⁰ and *Perfection Paint & Color Co. v. Konduris*,⁷¹ clearly state a foreseeability test with regard to a manufacturer's duty to anticipate product misuse, authority from diversity cases applying Indiana law vigorously denies any such duty. The court of appeals in *Conder* referred to the line of federal cases⁷² which assigned liability to a product seller only when the product was employed for its intended use. When a product such as a motor vehicle was involved in a collision, it clearly was not being used as intended. Therefore, no liability could attach to the vehicle manufacturer for enhanced injury, if the vehicle then proved to be uncrashworthy.⁷³

As the Indiana Court of Appeals observed in *Conder*,⁷⁴ this principle was overruled by *Huff v. White Motor Corp.*⁷⁵ *Huff* required product manufacturers to foresee the ordinary use environment their product would encounter. Thus, a vehicle manufacturer should anticipate that its products are likely to be involved in collisions; therefore, the manufacturer is responsible for taking reasonable steps to protect the users and passengers from injury during collisions when it is feasible to do so. The *Huff* court, however, stopped short of stating specifically that a manufacturer had a duty to foresee misuses of its

⁶⁹*Id.* at 16.

⁷⁰147 Ind. App. 46, 258 N.E.2d 652 (1970).

Misuse, either in using the product for a purpose not reasonably foreseeable to the manufacturer or in using the product in a manner not reasonably foreseeable for a reasonably foreseeable purpose, and assumption of risk, constitute the other defenses which the defendant may contend, and upon which the defendant has the burden of proof.

Id. at 67, 258 N.E.2d at 665 (Sharp, J., concurring).

⁷¹147 Ind. App. 106, 119, 258 N.E.2d 681, 689 (1970) ("Judge Sharp of this court correctly stated that the defense of misuse is available when the product is used 'for a purpose not reasonably foreseeable to the manufacturer'") (citing *Cornette v. Searjeant Metal Products*, 147 Ind. App. 46, 67, 258 N.E.2d 652, 665 (1970) (Sharp, J., concurring)).

⁷²405 N.E.2d at 545.

⁷³*Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir.), cert. denied, 385 U.S. 836 (1966). See also *Latimer v. General Motors Corp.*, 535 F.2d 1020 (7th Cir. 1976); *Schemel v. General Motors Corp.*, 384 F.2d 802 (7th Cir. 1967), cert. denied, 390 U.S. 945 (1968).

⁷⁴405 N.E.2d at 545.

⁷⁵565 F.2d 104 (7th Cir. 1977).

products. In a footnote, the *Huff* court, attempting to distinguish the prior cases requiring no foreseeability from its new rule, stated that those cases dealt with misuse and analytically were not apposite.⁷⁶ The court of appeals in *Conder* was unable to accept that distinction and stated: "While *Huff* is a so-called 'second collision' case, the *Huff* rationale, i.e., the environment in which a product is used must be taken into consideration by the manufacturer, is wholly apposite to a discussion of product misuse and a manufacturer's duty to warn."⁷⁷

In *Conder*, the supreme court majority recognized that foreseeability principles are applicable to a product misuse defense in Indiana, even though the court vacated the court of appeals decision for *Conder* and affirmed the jury verdict for Allis-Chalmers.⁷⁸ Although the supreme court stated that "[i]t would be an impossible task to require a manufacturer to give warnings to a user of all the ways in which a unit or any component of that unit might be misused,"⁷⁹ the court proceeded to cite *Perfection Paint* and *Cornette* to the effect that misuse is a defense when the product is used for a purpose not reasonably foreseeable to the manufacturer or when the product is used in an unforeseeable manner for a reasonably foreseeable purpose.⁸⁰ The supreme court concluded that "[i]t is only when a change or modification could be reasonably foreseen by the manufacturer to be a safety hazard and would not be apparent to the consumer or user that there could be liability of the manufacturer."⁸¹

⁷⁶*Id.* at 106 n.1. At the same time, the court overruled *Schemel v. General Motor Corp.* *Id.* at 109 n.7.

⁷⁷405 N.E.2d at 546 (emphasis added). Parenthetically, it should be noted that the Indiana Product Liability Act of 1978, IND. CODE §§ 33-1-1.5-1 to -8 (1982) lends indirect support to the Indiana Court of Appeals' reading of *Huff*. The statute provides for a defense to strict liability in tort "that a cause of the physical harm is a nonforeseeable misuse of the product by the claimant or any other person." *Id.* § 33-1-1.5-4(b)(2) (emphasis added). It should also be noted that diversity cases have had an unusually pervasive influence on Indiana product liability law. The Indiana Supreme Court has, until recently, spoken infrequently on product liability matters, while a series of important product cases primarily involving motor vehicles have been resolved in federal court. See *supra* note 73. The *Evans* rule, for example, was established by the Court of Appeals for the Seventh Circuit and was unchallenged in Indiana for eleven years until it was finally overruled in *Huff*, which, of course, was also a diversity case. See *supra* notes 73-76 and accompanying text.

⁷⁸435 N.E.2d at 12.

⁷⁹*Id.* at 17.

⁸⁰*Id.*

⁸¹*Id.* The supreme court ruled that the jury had been instructed with respect to misuse by referring to the trial court's instruction no. 8. Instruction no. 8 was quoted by the court of appeals and states in pertinent part that:

A manufacturer of a fork lift truck may be liable for injuries suffered by the user of the truck in spite of the fact that it was later changed or altered if the manufacturer could reasonably expect or foresee that the change or alteration might be made and foresees that the change or alteration might render the

Justice Hunter, dissenting in *Conder*, was unimpressed with Allis-Chalmers' argument that there was superseding causation and, hence, harmless error. The dissent appears to suggest that the misadjustment of the carburetor may have occurred subsequent to the delivery of the forklift to Globemaster.⁸² Thus, the jury may have found that Hull had delivered a nondefective product to Globemaster rather than finding superseding negligence by Globemaster's receiving foreman. If that were the case, Allis-Chalmers should not be allowed to argue that it must be insulated by the same shield of intervening causation which insulated Hull.

The dissent's analysis presents two problems. The first, of course, is the finding from the record by both the court of appeals and the supreme court majority that the forklift's governor-carburetor linkage was misadjusted when Hull delivered the machine to Globemaster.⁸³ Second, if in fact the carburetor was not misadjusted prior to delivery to Globemaster, the alleged defects in the forklift as manufactured would have to be the design and failure to warn defects which Conder claimed against Allis-Chalmers.⁸⁴ Those same defects, however, would have been present in the product when it was delivered by Hull. Under strict liability theory, Hull, because it was a seller in the chain of product distribution, would be equally culpable with Allis-Chalmers for sale of an unreasonably dangerous, defective product.⁸⁵ If logic and

fork lift truck unsafe.

405 N.E.2d at 544 (emphasis added by the court of appeals).

In his dissent, Justice Hunter took issue with the majority's attempt to cure the trial court's instruction no. 10 by coupling it with the above instruction no. 8. Instruction no. 10, submitted by Allis-Chalmers, found no duty on the part of a manufacturer to foresee misuse. Justice Hunter said:

The majority of this court, however, finds no error in the statement that a manufacturer is "not required to warn of potential dangers resulting from misuse." It finds the statement acceptable on the basis that the element of foreseeability was incorporated into other instructions. Those instructions, however, related to "substantial changes," not "misuse." The defenses are distinct in product liability analysis.

435 N.E.2d at 21 (Hunter, J., dissenting).

Justice Hunter is probably correct in his analysis, but the majority decision can be reasonably supported by the principles of intervening causation and harmless error. The important point is that the majority appears to have acknowledged that the *Evans-Schemel-Latimer* rule which found "no duty to foresee misuse," has no remaining vitality in Indiana.

⁸²435 N.E.2d at 19. Justice Hunter noted in dissent that Hull's customers frequently tampered with the adjustments made by the Hull mechanics. *Id.* Therefore, presumably, it was possible that Hull had leased the machine in perfect adjustment and some later third party had misadjusted the carburetor-governor linkage, perhaps because Allis-Chalmers had failed to provide adequate warnings of misadjustment dangers on the machine itself.

⁸³See 435 N.E.2d at 14; 405 N.E.2d at 542.

⁸⁴See *supra* notes 45-47 and accompanying text.

⁸⁵See RESTATEMENT (SECOND) OF TORTS § 402A (1965) (referring to "sellers" and

product liability theory are to be the tests where both defendants are tried before a single jury in a single action, either both parties should face a new trial or neither should.

The majority discussed at some length testimony given by Hull's mechanic, Robert Slabaugh. Slabaugh stated that he had learned carburetor adjustment from a fellow employee and that he had no need for warnings, instructions, or warning labels which were or might have been provided by Allis-Chalmers.⁸⁶ This testimony apparently dealt with whether a warning of the possibility of carburetor misadjustment would have been heeded. Indiana law provides that there is a rebuttable presumption that adequate warnings will be heeded.⁸⁷ The discussion of Slabaugh's testimony suggests that Allis-Chalmers may have sought to rebut that presumption. Although Slabaugh "was not the person who last serviced the vehicle before Conder's accident,"⁸⁸ Slabaugh's statements could suggest a Hull company attitude that manufacturer instructions and warnings were not necessary. The testimony could suggest that Hull considered itself sufficiently expert in forklift truck maintenance so that it need not rely on outsiders including equipment manufacturers, to teach its personnel the simple mechanics of carburetor adjustment. If then, a Hull employee did misadjust the carburetor, and Hull employees were unlikely to heed misadjustment warnings, the misadjustment could more readily be found to be an *efficient* intervening cause of Conder's injuries. The misadjustment would supersede any failure on Allis-Chalmers' part to provide an adequate warning of carburetor misadjustment potential and, therefore, relieve the manufacturer of liability.

D. The Seller as Guarantor of Product Quality

In *Conder v. Hull Lift Truck, Inc.*,⁸⁹ Conder assigned error to an instruction which "told the jury that under strict liability, a manufac-

stating that the rule applies "although the user has not bought the product from or entered into any contractual relation with the seller"). The removal of the privity requirement has generally been understood to create liability on any seller who either places or passes on a defective product into the stream of commerce. See *id.* comment f and comment l, illustration 1. The principal rationale for holding distributors, retailers, and other middlemen strictly liable is that these parties are better able to protect themselves, through indemnity and insurance mechanisms, than is the injured user or consumer.

⁸⁶435 N.E.2d at 16.

⁸⁷*Conder v. Hull Lift Truck, Inc.*, 405 N.E. 2d at 547. ("In Indiana, there is a rebuttable presumption that a sufficient warning would have been heeded.") (citing *Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820 (Ind. Ct. App. 1975), *rev'd on procedural grounds*, 265 Ind. 457, 358 N.E.2d 974 (1976)).

⁸⁸435 N.E.2d at 19 (Hunter, J., dissenting).

⁸⁹405 N.E.2d 538 (Ind. Ct. App. 1980), *aff'd in part, rev'd in part*, 435 N.E.2d 10 (Ind. 1982).

turer is not a guarantor in regard to the quality of its product."⁹⁰ The court of appeals agreed that this instruction ran counter to the "representational liability' rationale"⁹¹ of strict liability and should not have been given. The court ruled "that under strict liability the manufacturer, by law, does guarantee that his product is reasonably safe for its intended and foreseeable use."⁹²

Allis-Chalmers attempted to equate its submitted instruction with that pervasive maxim of Indiana product liability law which states that a manufacturer is "not an insurer against all accidents"⁹³ in which its product is involved. The maxim, of course, refers to the requirement the plaintiff prove that the product is in a defective condition, that the product is unreasonably dangerous, and that the unreasonably dangerous defect proximately caused legally cognizable damages.

The supreme court quoted the instruction in full and conceded that "quality" is a general term and is subject to different meanings depending on the context in which it is used.⁹⁴ But the supreme court suggested the gist of the instruction did not seriously distort the idea that under strict liability the seller represents no more than that the product will be "reasonably fit and safe for the purpose for which it was intended."⁹⁵ Intended use, a concept that has been in a flux in Indiana,⁹⁶ may have been clarified in *Conder* with this recognition that foreseeability of use and misuse are integral principles of Indiana product liability law.

E. Open and Obvious Dangers

In *Bemis Co. v. Rubush*,⁹⁷ the Indiana Supreme Court granted transfer and, in a three-two decision, vacated the Indiana Court of Appeals affirmance of a jury verdict for the plaintiff, ordering judgment to be entered for the defendant, Bemis Co.⁹⁸ The principal issue addressed by both the court of appeals and the supreme court in *Bemis* was the scope of Indiana's open and obvious danger rule in the context of strict products liability.⁹⁹

⁹⁰405 N.E.2d at 544.

⁹¹*Id.*

⁹²*Id.*

⁹³*Id.* at 545.

⁹⁴435 N.E.2d at 17.

⁹⁵*Id.* (quoting from plaintiff's tendered instruction no. 2 which was given by the trial court) (emphasis added).

⁹⁶See Vargo, *Products Liability in Indiana—In Search of a Standard for Strict Liability in Tort*, 10 IND. L. REV. 871, 878-81 (1977).

⁹⁷427 N.E.2d 1058 (Ind. 1981), *rev'd* 401 N.E.2d 48 (Ind. Ct. App. 1980).

⁹⁸427 N.E.2d at 1059.

⁹⁹As Justice Hunter pointed out in dissent:

That the majority directs the trial court to "enter judgment for defendants—

1. *The Open and Obvious Danger Rule.*—The court of appeals and the supreme court generally stated the open and obvious danger rule in identical words:

In the area of products liability, based upon negligence or based upon strict liability under § 402A of the Restatement (Second) of Torts, to impress liability upon manufacturers, the defect must be hidden and not normally observable, constituting a latent danger in the use of the product. Although the manufacturer who has actual or constructive knowledge of an unobservable defect or danger is subject to liability for failure to warn of the danger, he has no duty to warn if the danger is open and obvious to all.¹⁰⁰

It is apparent that this rule is, in reality, two separate rules, each supported by distinct policies. The first sentence requires the plaintiff to prove the existence of a latent defect before he can recover. Under this provision, patent defects, even if they cause injury, can not subject a product seller to liability. The policy advanced by the rule is one of risk allocation. Under the formula, product users and consumers are assigned all risks arising from dangers which would be open and obvious to an ordinary user, while product sellers are assigned liability only for latent dangers in the products they sell. The second sentence, or rule, merely suggests that warning of obvious danger is not required by either negligence or strict liability theory. The obviousness of the danger is the equivalent of a warning; thus, further warning would be redundant, or even, as some commentators suggest, counter-productive.¹⁰¹

Bemis urged that both rules be given effect, but the Indiana Court of Appeals disagreed. "Our reading of the Indiana cases, starting with *J. I. Case Company* . . . indicates that the rule was recited in connection with the duty to warn where latent defect exist. Indiana courts have never faced an application of the rule straight-on."¹⁰² The supreme

appellants" . . . unmistakably indicates its decision rests on a singular proposition: recovery for injuries suffered at the hands of an "open and obvious danger" are barred as a matter of law under this jurisdiction's interpretation of Section 402A of the Restatement (Second) of Torts (1965). Erroneous instructions or improperly admitted evidence would warrant only a new trial

¹⁰⁰427 N.E.2d at 1066 (emphasis by Justice Hunter).

¹⁰¹427 N.E.2d at 1061; 401 N.E.2d at 56.

¹⁰²See A. WEINSTEIN, A. TWERSKI, H. PIEHLER & W. DONAHER, PRODUCTS LIABILITY AND THE REASONABLY SAFE PRODUCT 64-68 (1978) ("The overuse of warnings invites consumer disregard and ultimate contempt for the warning process.").

¹⁰³401 N.E.2d at 56. For a discussion of the development of the open and obvious danger rule under Indiana law, in both Indiana and federal courts, see Note, *Indiana's Obvious Danger Rule for Products Liability*, 12 IND. L. REV. 397 (1979). Justice Hunter,

court, however, decided that the broad interpretation urged by Bemis, that a manufacturer is not liable for any open or obvious danger, was in harmony with Indiana case law and it reversed.¹⁰³

2. *The Open and Obvious Danger Rule and Strict Products Liability.*—In 1970, in *Cornette v. Searjeant Metal Products*,¹⁰⁴ the Indiana Court of Appeals adopted strict products liability as set out in section 402A of the Second Restatement of Torts.¹⁰⁵ In 1973, the Indiana Supreme Court followed suit in *Ayr-Way Stores, Inc. v. Chitwood*.¹⁰⁶ Section 402A provides that a product seller is subject to a "special liability" if he sells a product in "defective condition unreasonably dangerous" and that condition proximately causes physical harm to an ultimate user or consumer.¹⁰⁷ The risk allocation policy of section 402A, sometimes referred to as enterprise liability, is to assign the cost of accidents caused by defective products to the party best able to bear the initial cost, best able to spread the cost through insurance, and best able to take preventive action for the future.¹⁰⁸ The fundamen-

in dissent, cited this authority for the proposition that the interpretation of the rule as an absolute bar to plaintiff recovery is primarily a result of federal diversity courts extending, in dicta, the holdings of early Indiana cases which merely emphasized the importance of protecting users from latent dangers. 427 N.E.2d at 1066 (Hunter, J., dissenting).

¹⁰³427 N.E.2d at 1061-64.

¹⁰⁴147 Ind. App. 46, 258 N.E.2d 652 (1970).

¹⁰⁵*Id.* at 56, 258 N.E.2d at 656. See *supra* note 9.

¹⁰⁶261 Ind. 86, 300 N.E.2d 335 (1973).

¹⁰⁷RESTATEMENT (SECOND) OF TORTS § 402A (1965).

¹⁰⁸The policy of initial risk bearing by the seller who then "spreads" the risk through liability insurance is articulated in comment c to § 402A. "[P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained." RESTATEMENT (SECOND) OF TORTS § 402A comment c (1965). The objective of deterrence is not expressly articulated in § 402A or in the section's comments, yet it can be readily inferred that a policy which assigns the initial burden of loss to the seller will motivate the seller to take whatever cost effective steps are available to it to avoid that burden in the future. A link between the assignment of liability and safer products was explicitly recognized, however, by Justice Traynor in his concurring opinion in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring), in which he stated:

Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot.

Id. at 462, 150 P.2d at 440-41.

In *Conder v. Hull Lift Truck, Inc.*, 405 N.E.2d 538 (Ind. Ct. App. 1980) the court cited the *Escola* case and other authorities in referring to the safety incentive rationale. "This rationale assumes it is in the public interest to fix financial responsibility for a product injury wherever it will most effectively reduce hazards to life and health inherent in products that reach the market." *Id.* at 546 & n.2.

tal assumption drawn from the policy is that the party will normally be the product seller rather than the product user.

Consumer contemplation is the test for unreasonably dangerous defectiveness under section 402A. Both the Indiana Court of Appeals and the Indiana Supreme Court acknowledged that this test is found in comments g and i to section 402A.¹⁰⁹ Both courts noted that "to be actionable under § 402A, the injury-producing product must be . . . dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."¹¹⁰

But from this language, the two courts reached two separate and distinct interpretations. The court of appeals recognized that the obviousness of a product's hazards may bring some products within the orbit of the ordinary consumer's contemplation. However, in other cases the obviousness of danger may be insufficient to make the product reasonably safe. Although the consumer or user confronted by a truly patent danger may not claim that the seller failed to warn him of the danger, nevertheless he may be able to claim that he had contemplated that the seller would furnish a safer product. While obviousness might be an important factor in determining defectiveness, it is but *one factor* that must be weighed "in determining the ultimate question of whether the product was in a defective condition unreasonably dangerous, that is, dangerous to an extent beyond that which is contemplated by the ordinary consumer . . .".¹¹¹

The supreme court, however, adopted the interpretation of consumer contemplation urged by the defendant.¹¹² The defendant argued that user contemplation is to be equated with user knowledge; what the user knows or should know about the product's dangerous propensities is what he contemplates. Because a user knows or should know of the existence of obvious dangers, he therefore contemplates such dangers, and under comments g and i, contemplated dangers can not be unreasonable dangers.¹¹³ It must be conceded that the word

¹⁰⁹427 N.E.2d 1058, 1061 (Ind. 1981); 401 N.E.2d 48, 56-57 (Ind. Ct. App. 1980) (citing RESTAMENT (SECOND) OF TORTS § 402A comments g and i (1965)).

¹¹⁰427 N.E.2d at 1061. The appellate court used almost identical language but referred to the article sold instead of the injury-producing product. 401 N.E.2d at 57. Both courts were referring to § 402A comment i.

¹¹¹401 N.E.2d at 57.

¹¹²427 N.E.2d at 1061.

¹¹³See Reply Brief of the Appellants at 11-13, *Bemis Co. v. Rubush*, 401 N.E.2d 48 (Ind. Ct. App. 1980) for a full development of the argument summarized in the text. Bemis states:

It is axiomatic that if a danger associated with a product is open and obvious that danger will be within the contemplation of the ordinary consumer with the ordinary knowledge common to the community as to that product

contemplation is perhaps ambiguous in that it may refer either to what the user knows or it may refer to his reasonable expectations. The latter interpretation, however, seems much more in harmony with the risk allocation policy of strict liability than does the former. The supreme court's interpretation that all patent dangers are to be classified as reasonable, as a matter of law, bars recovery by any plaintiff unable to prove a latent danger.

3. *The Latency Issue.*—In order for the supreme court's interpretation of the open and obvious danger rule to have effect, the product danger must be found to be both open and obvious. In *Bemis*, the supreme court had no trouble finding that the Bemis product, a fiberglass insulation batt packing machine, presented no latent dangers. The court stated that “[a]ppellees admit that the descent of the shroud was an open and obvious danger which was well known to the operators of the machines and which would be obvious to anyone observing the machine.”¹¹⁴

Actually, the plaintiff never conceded that the danger posed by the Bemis batt packer was *both* open and obvious. Rubush argued that the design and function of the machine did not suggest adequately the actual scenario of harm which later occurred.¹¹⁵ The instrumentalities of bag clamp and descending metal shroud were observable and familiar to any experienced bagger, as were the individual capacities of those components to grab and crush respectively. However, the danger of the clamp grabbing an operator's hand, causing momentary panic, and thus diverting the operator's attention from the descending shroud was not apparent before the accident. Therefore, the plaintiff claimed, a *latent* defect in the product existed.¹¹⁶ Similarly, the operation of the machine required the operator to focus his attention at a point away from the descending shroud, thus ampli-

and, accordingly, the danger cannot be considered to be “unreasonable” within the meaning of the Restatement.

Reply Brief of the Appellants at 12.

Although the supreme court never defines “contemplation” it does accept the concept of a consumer contemplation test for determining whether a product in defective condition is unreasonably dangerous. 427 N.E.2d at 1061. If the court's broad interpretation of the open and obvious danger rule as an absolute bar to plaintiff recovery is to be harmonized with consumer contemplation, all obvious dangers must be held to be within the ordinary consumer or user's contemplation as a matter of law. Thus, under this reasoning, what the user knows or should know about the product must be held to have been contemplated.

¹¹⁴427 N.E.2d at 1060.

¹¹⁵See Plaintiff's Brief in Opposition to Petition for Transfer at 26-29, *Bemis Co. v. Rubush*, 427 N.E.2d 1058 (Ind. 1981).

¹¹⁶*Id.* “Rather, the dangers relate to the possibility of a worker being accidentally ‘caught’ within the so-called zone of danger during the shroud's descent.” *Id.* at 27 (emphasis in the original).

fying the tendency toward momentary inadvertance which is always present in a repetitive factory task.¹¹⁷ That design feature was characterized by the plaintiff as a "hidden trap."¹¹⁸

Indiana and other jurisdictions have recognized the distinction between openness and obviousness. Under Indiana law, the propensity of kerosene to ignite¹¹⁹ and the risk of high-stacking with a lift truck without an overhead guard¹²⁰ have been held to be both open and obvious dangers. However, the limited visibility characteristics of an industrial crane cab,¹²¹ and the ability of a pitching machine catapult to strike out violently at a bystander, even though the machine was not plugged in,¹²² were held to be latent dangers even though the injury causing instrumentalities were entirely observable. Although New York originally used the broad interpretation of the open and obvious danger rule,¹²³ the New York Court of Appeals also had distinguished the obviousness of the condition from the obviousness of the danger and held that a determination of the latter was a jury question.¹²⁴ New York finally reached an ultimate repudiation of the open and obvious danger rule by progressively restricting the fact situations in which the rule would be applied.¹²⁵ It is possible that Indiana will follow this same route.

Although the Indiana Supreme Court swept aside the plaintiff's "hidden trap" theory by announcing that the latency issue had been conceded by the plaintiffs,¹²⁶ the court did not go so far as to rule that any open danger would, in the future, be held patent as a matter of law. If the supreme court has an opportunity to rule on the "football helmet" case, which received national attention during the survey period,¹²⁷ it will be interesting to see how the court will classify the manufacturer's failure to warn that the helmet might not protect the user from neck and spine injuries resulting from a blow on the top of the head when head and spine are in alignment. The court may

¹¹⁷*Id.* at 27-28.

¹¹⁸*Id.* at 28. ("In a very real sense, the machine design created a hidden trap for the conscientious worker.") (emphasis in the original).

¹¹⁹See *Burton v. L.O. Smith Foundry Prods. Co.*, 529 F.2d 108 (7th Cir. 1976).

¹²⁰See *Posey v. Clark Equip. Co.*, 409 F.2d 560 (7th Cir.), cert. denied, 396 U.S. 940 (1969).

¹²¹See *Zahora v. Harnischfeger Corp.*, 404 F.2d 172 (7th Cir. 1968).

¹²²See *Dudley Sports Co. v. Schmitt*, 151 Ind. App. 217, 279 N.E.2d 266 (1972).

¹²³See *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950).

¹²⁴See *Bolm v. Triumph Corp.*, 33 N.Y.2d 151, 160, 305 N.E.2d 769, 774, 350 N.Y.S.2d 644, 651 (1973).

¹²⁵See Note, *Indiana's Obvious Danger Rule for Products Liability*, 12 IND. L. REV. 397, 419-22 (1979).

¹²⁶See *supra* note 114 and accompanying text.

¹²⁷See *Bedan v. Rawlings Sales Co.*, No. 1-682A142 (Ind. Ct. App., filed June 14, 1982).

have to decide whether the risk of injury in that case was latent or patent.

4. *Cost-Benefit Analysis as a Test for Defectiveness.*—*Bemis* was a design and warning case. Courts holding that ordinary users expect product sellers to design products as safe as cost and performance constraints will permit are faced with the question of what is a reasonable hazard. Justice Hunter, in a vigorous and learned dissent in *Bemis*,¹²⁸ argued that the question of how much safety is enough is a matter of design factor tradeoffs.¹²⁹ He applied the negligence test of balancing ““the likelihood of harm, and the gravity of harm if it happens, against the burden of the precaution””¹³⁰ to strict products liability. Justice Hunter invoked the widely quoted seven factor analysis advanced by Dean Wade as an appropriate measure of design defectiveness to satisfy the consumer contemplation test of section 402A.¹³¹ Justice Hunter’s dissent recognized that strict liability does not mean absolute liability, nor does it mean that all dangers are unreasonable. Consumers and users want product safety, but they want other performance characteristics as well. Consumers expect manufacturers to weigh and balance all those performance characteristics, giving the factors of cost and risk appropriate weight.

At trial, the plaintiff presented testimony by two expert witnesses who defined unreasonable hazard in cost-benefit terms. Dr. Richard L. Fox, a professor of engineering at Case Western Reserve University stated that: “[A] hazard or risk in a product is unreasonable if it could be removed and the cost of removal is not significant nor the cost of removal does not seriously reduce the utility of the product.”¹³²

Holding that admission of this evidence was error because it permitted the jury to find a manufacturer liable for injury from a patent danger, the supreme court stated that “[t]his would make manufacturers insurers [sic] of any product they put in the open market and render them liable for injuries and damages to those using the machine regardless of the facts and circumstances surrounding the injury. This is not the law in Indiana.”¹³³ It should be emphasized that under Dr. Fox’s definition, a hazard would be reasonable and the product seller would not incur liability, if the cost of removal were not commensurate

¹²⁸427 N.E.2d 1058 (Ind. 1981) (Hunter, J., dissenting).

¹²⁹*Id.* at 1070.

¹³⁰*Id.* (quoting *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 386, 348 N.E.2d 571, 577-78, 384 N.Y.S.2d 115, 121 (1976) (quoting 2 HARPER & JAMES, THE LAW OF TORTS § 28.4 (1956))).

¹³¹427 N.E.2d at 1070 (quoting Wade, *Strict Liability of Manufacturers*, 19 Sw. L. J. 5 (1965)).

¹³²427 N.E.2d at 1063.

¹³³*Id.*

with the risk, or if removal of the hazard would make a useful product inutile. In addition, the plaintiff still would have to prove the defect proximately caused his injuries. This exposure of the seller to product liability may be greater than the supreme court considers appropriate, but it is significantly less than that of an insurer.

5. *The Perverse Effects of the Open and Obvious Danger Rule.*—Justice Hunter noted in his dissent that a broad interpretation of the obvious danger rule “‘encourages manufacturers to be outrageous in their design, to eliminate safety devices, and to make hazards obvious.’”¹³⁴ If one rationale for strict product liability specifically, and for tort liability generally, is to reduce the cost of accidents in the aggregate, then the broad patent danger rule may operate perversely. If the class of open dangers are made entirely immune from liability, we can expect the number of such dangers to increase and the accident rate along with it. That possibility is probably why Justice DeBruler noted in dissent that:

[I]n the trial court's mind, and I think correctly so, “hidden defects and concealed dangers” was subsumed within the new standard, “defective condition unreasonably dangerous” and the new focus was no longer upon whether the defects and dangers of the product were hidden and concealed, but upon whether they were reasonable.¹³⁵

Under that analysis, an obvious danger which tends to increase the aggregate cost of accidents would likely be found unreasonable, whereas one which does not tend to raise accident rates and costs would likely be reasonable.

Another perverse effect is economic. Eliminating liability for obvious dangers will benefit, if anyone, the class of manufacturers and sellers who introduce such dangers into the stream of Indiana commerce. This class is composed primarily of non-Indiana based product sellers.¹³⁶ On the other hand, removal of potential tort recovery for

¹³⁴*Id.* at 1070 (quoting *Auburn Mach. Works Co. v. Jones*, 366 So. 2d 1167, 1170 (Fla. 1979)).

¹³⁵427 N.E.2d at 1065 (DeBruler, J., dissenting).

¹³⁶In a national and international economy it can be safely assumed that the bulk of manufactured goods used and consumed in Indiana are imported from other states and countries, while the bulk of goods manufactured in Indiana are exported. Actually, 75% of the manufactured goods with an Indiana destination have an out-of-state origin. U.S. BUREAU OF CENSUS REPORT No. TC77-CS, 1977 CENSUS OF TRANSPORTATION COMMODITY TRANSPORTATION SURVEY—SUMMARY 3, Table I. An upper bound of 17½ percent for the dollar value of all goods manufactured and used in Indiana can be derived from this report by dividing the value of all shipments having both an Indiana origination and destination by the value of all shipments by U.S. manufacturing firms having an Indiana destination. *Id.* at 12, 14 Table I.

a substantial class of Indiana plaintiffs, those most likely to be found in the workplace,¹³⁷ will put pressure on compensation programs such as the Indiana Workmen's Compensation System.¹³⁸ State and federal social service systems, including social security and medicaid also will be affected negatively. It should be emphasized that these latter compensation systems have no built-in mechanisms which tend to deter accident causing conduct.¹³⁹

Finally, in *Gilbert v. Stone City Construction Co.*,¹⁴⁰ the Indiana Court of Appeals recognized a positive duty on the part of manufacturers, sellers, and lessors to deploy feasible safety devices¹⁴¹ on products to guard users and even bystanders.¹⁴² The supreme court's broad obvious danger rule, however, would preclude liability if the absence of a safety device made a danger apparent. The inconsistency here promises to create substantial uncertainty, unpredictability, and litigation. If the *Bemis* rule is finally held to take priority over the *Gilbert* rule, the result will be an increase in the frequency of accidents that safety devices could prevent.

6. *The Bemis Case and the Lantis Case.*—During the survey period, the diversity case of *Lantis v. Astec Industries*¹⁴³ was reversed and remanded for a new trial. Because *Lantis* was discussed in the previous survey,¹⁴⁴ it is unnecessary to review the case except to recapitulate that it involved the plaintiff's decedent, who was killed

¹³⁷Obvious dangers are likely to be disproportionately found in workplace products for several reasons. First, useful work often demands substantial hazards. Industrial processes frequently require heavy equipment with large moving components, powerful chemicals, and fluids under pressure. Second, workers become familiar with the products they use because of constant exposure to them, hence the dangers "become obvious" to such ordinary users. Third, workers are in a weaker position to reject the use of products with obvious dangers than are consumers. A consumer can simply refuse to buy such products, whereas the worker may be forced to choose unemployment as the only viable alternative to exposure to the risk. Thus, obviously dangerous workplace products are less likely to be driven from the marketplace by ordinary market forces than are patently dangerous consumer products.

¹³⁸The Indiana Workmen's Compensation Act is codified at IND. CODE §§ 22-3-1-1 to -10-3 (1982).

¹³⁹Both tort liability insurance and workers compensation insurance are to some extent experience rated. The insured is motivated at least to some extent to seek ways to reduce the cost of accidents which are under his control so as to reduce his premiums. That incentive is absent under the social security system.

¹⁴⁰171 Ind. App. 418, 357 N.E.2d 738 (1976).

¹⁴¹*Id.* at 426, 357 N.E.2d at 744. ("Those who come in contact with a product may reasonably expect its supplier to provide feasible safety devices in order to protect them from the dangers created by the design.").

¹⁴²*Id.* at 423, 357 N.E.2d at 742-43.

¹⁴³648 F.2d 1118 (7th Cir. 1981).

¹⁴⁴See Vargo, *Products Liability, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 289, 298-99 (1982). See also Leibman, *Strict Tort Liability for Unfinished Products*, 19 A. BUS. L.J. 407, 433-36, 437-39 (1982).

when he stepped through an opening in a component platform of an asphalt plant which he was helping to assemble for his employer. The trial court had granted summary judgment for the defendant manufacturer on the strict liability count, finding that the component platform had not yet entered the stream of commerce. The Court of Appeals for the Seventh Circuit ruled that this finding was an overly restrictive view of Indiana's version of strict liability in tort.¹⁴⁵ The court held that components are properly to be considered products in their own right; worker-assemblers are to be considered product users under section 402A; and unassembled products are to be treated as finished products if the contract of sale contemplates that they will reach the purchaser in unfinished form.¹⁴⁶ Permitting the plaintiff to proceed on the strict liability count was crucial; otherwise, Lantis' failure to discover or guard against the alleged defect, the opening in the deck, would be a defense of contributory negligence for the manufacturer.¹⁴⁷

If *Lantis* is retried under the strict liability count, contributory negligence still will not be a defense. However, after *Bemis*, the plaintiff may have difficulty proving that there was a latent defect in the product, a necessary element of the claim. The thirty by thirty-six inch hole in the platform was probably obvious and was certainly dangerously open. By frustrating the plaintiff's attempt to make out a *prima facie* case, the defendant may now accomplish at an earlier stage in the proceedings what it cannot accomplish through the defense of contributory negligence. If strict liability theory allows recovery by a plaintiff despite his negligent failure to discover a dangerous condition, it may be asked how the theory can be consistent with a rule of law barring recovery by characterizing the same dangerous condition as undefective.

7. *Obvious Dangers and Proximate Cause.*—To make out a *prima facie* case under strict liability the plaintiff must prove three elements—defect, causation, and damages. The obvious danger rule goes to the element of defect. The broad interpretation of the rule, as adopted by the Indiana Supreme Court, classifies all patent dangers as undefective. Therefore, once the danger is found to be patent, rather than latent, it is immaterial whether the alleged dangerous condition proximately caused the injury, because that condition cannot be a product defect.

Because the plaintiff also disputed the issue of latency in *Bemis* the defendant raised the issue of causation on appeal. *Bemis* assigned

¹⁴⁵648 F.2d at 1121.

¹⁴⁶*Id.* at 1119, 1121-22.

¹⁴⁷See RESTATEMENT (SECOND) OF TORTS § 402A comment n (1965) ("Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence.").

error to an instruction which told the jury "that in order to find for Bemis the jury had to find that the batt packer was not defective or unreasonably dangerous, and that Gary [Rubush] was contributorily negligent in causing his injury."¹⁴⁸ Bemis was seeking to establish that Rubush's negligent conduct was the *sole* proximate cause of his injury. If that were true, the issue of defect would be immaterial because the plaintiff's case would fail for want of proving the essential element of proximate causation. However, the instruction, as given to the jury, required a finding not only that Rubush's conduct was the sole cause of his injury but also that the batt packer was undefective. The instruction was clearly wrong because it required the jury to find too much. But, interestingly, in this instance the Indiana Court of Appeals found the error to be harmless because other instructions on this issue were correct,¹⁴⁹ while the supreme court found the Bemis argument persuasive.¹⁵⁰

It also should be noted that although contributory negligence is not a recognized defense to strict liability, it can be used to refute the element of causation. This approach will only be effective, however, if the plaintiff's, or third party's, negligence is shown to be the efficient, superseding, intervening, and thus sole cause of injury. Where such contributory negligence is only *one* proximate cause of injury, the original actor's negligence, or the defective condition of his product, will suffice to create liability.¹⁵¹

¹⁴⁸427 N.E.2d at 1064 (emphasis added).

¹⁴⁹401 N.E.2d at 60 ("Instructions are sufficient if, considering them as a whole, the jury has been fully and fairly instructed. . . . We feel that the instructions here given did fairly instruct the jury and that Instruction No. 14 was not error.").

¹⁵⁰427 N.E.2d at 1064.

¹⁵¹See *supra* note 56.

XII. Professional Responsibility

DONALD L. JACKSON*

A. Professional Responsibility

1. *Sanctions for Legal Misconduct.*—The Indiana Constitution grants the Indiana Supreme Court exclusive jurisdiction in matters involving the admission and discipline of attorneys.¹ Although the court is vested with broad discretion in imposing sanctions for legal misconduct, the sanctions imposed by the supreme court during the past survey period reveal a degree of predictability.

Of the seven disciplinary proceedings during the survey period that resulted in disbarment, five involved the conversion, commingling, or unethical retention of clients' funds.² Disbarment was not ordered in only one proceeding in which an attorney was found to have commingled or converted clients' funds.³ In these disbarment proceedings, the supreme court repeatedly emphasized the necessity for the presence of "trust and fiduciary responsibility" in the attorney-client relationship.⁴ In this regard, it may be concluded that the fraudulent conversion or commingling of funds will generally bring about the imposition of disbarment, the supreme court's most severe sanction.

Disbarment also was ordered in two proceedings not involving the

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¹IND. CONST. art. 7, § 4, provides, in part, that:

The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal and retirement of justice and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction.

Id.

²In re Martinez, 431 N.E.2d 490 (Ind. 1982) (disbarment ordered because respondent converted proposed settlement funds); In re Davis, 429 N.E.2d 938 (Ind. 1982) (disbarment ordered because respondent refused to return unearned portion of his fee); In re Walton, 427 N.E.2d 654 (Ind. 1981) (disbarment ordered because respondent purported to return the retainer fee by issuing a check that was subsequently dishonored due to insufficient funds); In re McCain, 425 N.E.2d 645 (Ind. 1981) (disbarment ordered because respondent converted interest payments due the client under a land sale contract); In re Slenker, 424 N.E.2d 1005 (Ind. 1981) (disbarment ordered because respondent converted funds from an estate while serving both as attorney for the estate and as executor).

³See In re Mendez, 427 N.E.2d 652 (Ind. 1981). For mitigating circumstances which may have contributed to the imposition of a more lenient sanction, see *infra* notes 31-32 and accompanying text.

⁴See, e.g., In re Martinez, 431 N.E.2d 490, 493 (Ind. 1982); In re McCain, 425 N.E.2d 645, 649 (Ind. 1981).

conversion or the commingling of clients' funds. In *In re Moody*,⁵ an attorney was found to have engaged in abusive and bizarre conduct directed towards the Honorable Alfred J. Pivarnik while Pivarnick was serving as judge of the Porter County Superior Court;⁶ therefore, disbarment was ordered.⁷

In *In re McKenna*,⁸ the attorney, McKenna, had given to a client a business card which indicated that McKenna's office was located in a certain office building; however, McKenna's office equipment and files had been taken into possession by the building manager due to McKenna's failure to pay his rent. After McKenna was retained by the client to initiate a lawsuit, McKenna repeatedly assured the client that the case had been filed. After discovering that the action had not been filed by McKenna, the client filed the action pro se.

On another occasion, McKenna had been paid a retainer to file a petition for adoption. Although McKenna filed the petition, he failed to submit a final order for the judge's signature as requested by the court. McKenna falsely assured his client that the order had been tendered to the court. Eventually, another attorney prepared the order without charge, and the petition was granted. From these facts, the court concluded that disbarment was warranted.⁹

Somewhat unpredictable is the sanction which will be imposed for mere neglect. During the past survey period, disciplinary proceedings involving an attorney's neglect of legal matters entrusted to him resulted in two disbarments,¹⁰ four suspensions,¹¹ and one public

⁵428 N.E.2d 1257 (Ind. 1981).

⁶Indiana Supreme Court Justice Pivarnik did not participate in the *Moody* disciplinary proceeding.

⁷428 N.E.2d at 1262. The *Moody* court did not discuss Judge Pivarnik's failure to hold Moody in contempt at the time of Moody's misconduct. Obviously, a question is raised as to why Moody's conduct was found to warrant disbarment but was not found to warrant a contempt citation at the time it occurred.

⁸422 N.E.2d 287 (Ind. 1981).

⁹*Id.* at 289.

¹⁰*In re Walton*, 427 N.E.2d 654 (Ind. 1981), modified, 431 N.E.2d 474 (Ind. 1982) (respondent allowed the statute of limitations to expire on clients' claims, failed to appear at the trial of his clients' action, settled a claim without the consent or authorization of his client, failed to file a petition in bankruptcy, and failed to adequately represent a client in a small claims proceeding); *In re McKenna*, 422 N.E.2d 287 (Ind. 1981) (respondent failed to file suit and failed to tender an order to the court after being requested to do so by the judge). It should be noted that the court's order of disbarment in *Walton* was subsequently modified to a two-year suspension. *In re Walton*, 431 N.E.2d 474 (Ind. 1982).

¹¹*In re Snyder*, 428 N.E.2d 17 (Ind. 1981) (respondent failed to commence a dissolution proceeding after being retained to do so); *In re Deardorff*, 426 N.E.2d 689 (Ind. 1981) (respondent failed to take any action on behalf of his clients for over three years, resulting in the dismissal of his clients' claims); *In re Darby*, 426 N.E.2d 683 (Ind. 1981) (respondent failed to appear at a hearing, failed to file a lawsuit, and failed

reprimand and admonishment.¹²

In originally imposing the sanction of disbarment in *In re Walton*,¹³ the supreme court placed primary emphasis on the effect of the respondent's neglect stating:

Unfortunately, as in most human endeavors, neglect, procrastination and non-accomplishment are present in the legal profession. But in the legal profession, neglect produces a particularly pernicious consequence and it is for this reason that the Disciplinary Rules of this Court proscribe such conduct.

The present case epitomizes the harmful results of neglect. Statutes of Limitations expired, lay parties were required to appear without the assistance of counsel, and parties' interests were abandoned through the unwanted settlement of claims. The findings in this cause indicate that the Respondent had a total disregard for the prejudicial consequences of his inaction. His clients were the victims of this disregard.¹⁴

In light of the rationale used in *Walton*, it is difficult to understand why the court in *McKenna* imposed the sanction of disbarment, especially in light of the supreme court's subsequent modification of Walton's disbarment to a two-year suspension. Although *McKenna* neglected to file a small claims complaint as requested and neglected to prepare a final adoption order after representing that he would do so, neither instance of neglect proved to be irremediable. A possible explanation for the severity of the sanction imposed in *McKenna* may be the simplicity of the tasks which *McKenna* failed to perform.¹⁵

It appears that simple neglect, unaccompanied by aggravating circumstances, will not bring about the imposition of the most severe sanctions. Nonetheless, where an attorney's neglect is accompanied by deceit and misrepresentation aimed at "covering up" neglect or incompetence, stricter sanctions will be imposed. This is illustrated in *McKenna* and *Walton*.¹⁶ In each of these disciplinary proceedings, which involved serious neglect and resulted in disbarment, the court

to return the client's papers upon demand); *In re Shea*, 425 N.E.2d 76 (Ind. 1981) (suspension ordered due to respondent's six-year delay in filing an action on behalf of a client).

¹²*In re Brown*, 429 N.E.2d 966 (Ind. 1982) (respondent failed to complete his obligations as the attorney for an estate in a timely manner).

¹³427 N.E.2d 654 (Ind. 1981), modified, 431 N.E.2d 474 (Ind. 1982).

¹⁴*Id.* at 657.

¹⁵In this regard, the court in *McKenna* stated that the "[r]espondent's misconduct relates to uncomplicated, routine matters which can and should be expeditiously accomplished by any attorney. A client should be able to anticipate prompt resolution of legal questions of this nature." 422 N.E.2d at 289. The court also noted that *McKenna* had repeatedly misrepresented to his client that the tasks had been completed.

¹⁶See *In re McKenna*, 422 N.E.2d 287 (Ind. 1981); *In re Walton*, 427 N.E.2d 654 (Ind. 1981).

relied on the fact that misrepresentations regarding the status of the clients' cases had been made.¹⁷ *In re Deardorff*¹⁸ also exemplifies this situation. In ordering Deardorff's suspension, the court placed primary emphasis on Deardorff's deceitful conduct, which was designed to camouflage his inability to further his clients' interest rather than his neglect of his clients' claim. The court stated:

[Deardorff's conduct] was not merely negligence; Respondent engaged in a conscious, elaborate process whereby events lending credence to his misrepresentations were staged.

....
There is no place in the practice of law for deceiving one's client. Deception of a client strikes at the very heart of the oath taken by each person who assumes the position of attorney.¹⁹

*In re Seely*²⁰ involved an attorney's obvious intoxication during a criminal trial in which he represented the defendant. The court found such conduct to be "undignified, discourteous and degrading to a tribunal."²¹ Recognizing its responsibility "to protect the public from attorneys who, for whatever reason, cannot meet the obligations imposed by the [legal] profession,"²² the court suspended the respondent from the practice of law for a period of ninety days.²³

In *In re Price*,²⁴ an attorney was suspended for a period of not less than one year for engaging in conduct involving misrepresentation before a grand jury and for failing to reveal the settlement of a client's lawsuit to welfare officials as required by law. The primary importance of the *Price* decision lies in the court's finding that the scienter element of a disciplinary charge "may be analogized to what constitutes 'knowingly' in a criminal charge."²⁵

Two cases arising from somewhat unusual circumstances resulted in public reprimands for the attorneys involved. In *In re Lantz*,²⁶ the respondent was a part-time prosecuting attorney who also initiated numerous civil actions based upon "bad checks" tendered to his clients.

¹⁷*In re McKenna*, 422 N.E.2d 287, 289 (Ind. 1981); *In re Walton*, 427 N.E.2d 654, 655 (Ind. 1981).

¹⁸426 N.E.2d 689 (Ind. 1981).

¹⁹*Id.* at 692.

²⁰427 N.E.2d 879 (Ind. 1981).

²¹*Id.* at 879.

²²*Id.* at 880.

²³*Id.*

²⁴429 N.E.2d 961 (Ind. 1982).

²⁵*Id.* at 964. With respect to criminal intent, IND. CODE § 35-41-2-2(b) (1982) states that "[a] person engages in conduct 'knowingly' if, when he engages in conduct, he is aware of a high probability that he is doing so." IND. CODE § 35-41-2-2(b) (1982).

²⁶420 N.E.2d 1236 (Ind. 1981).

The court held that such a practice gave the appearance of using the pressure of a public office to collect civil debts for private clients,²⁷ in violation of Disciplinary Rules 9-101(B), 5-104(B), and 1-102(A)(5) and (6) of the Code of Professional Responsibility.²⁸ In *In re Adams*,²⁹ the attorney was publicly admonished and reprimanded for making overt sexual advances³⁰ toward a female client.

During the survey period, the supreme court discussed two types of mitigating circumstances that it will consider when imposing disciplinary sanctions. In the only case decided during the survey period involving the commingling of a client's funds that did not result in disbarment,³¹ the court weighed heavily the civic contributions of the respondent.³² In addition, youth and inexperience were discussed twice during the survey period as possible mitigating circumstances. Although youth and inexperience were not sufficient to avoid discipline in either *Price* or *Deardorff*,³³ the court strongly implied in *Price* that a more experienced attorney would have suffered the imposition of a much stricter sanction. The court stated that "[w]ere it not for his inexperience, Respondent's conduct would easily be viewed as a intolerable attempt at personal gain through the exploitation of an unknowing client. But we will not project such improper motivations."³⁴

During the survey period, the supreme court offered some guidance as to the various factors that it will take into consideration when determining an appropriate disciplinary sanction. In *Walton*, the court stated that it will examine

the nature of the violation, the specific acts of misconduct, [the supreme court's] responsibility to preserve the integrity of the Bar, and the risk, if any, to which [the court] will subject the

²⁷*Id.* at 1237.

²⁸MODEL CODE OF PROFESSIONAL RESPONSIBILITY DRs 9-101(B), 5-104(B), 1-102(A)(5) and (6) (1979). The Model Code of Professional Responsibility is reproduced in the INDIANA RULES OF COURT (1982).

²⁹428 N.E.2d 786 (Ind. 1981).

³⁰The court found that Adams grabbed a female client, "kissing her and raising her blouse." *Id.* at 787.

³¹*In re Mendez*, 427 N.E.2d 652 (Ind. 1981). See *supra* note 3 and accompanying text.

³²427 N.E.2d at 653. In this regard, the court stated:

In our determination of an appropriate disciplinary sanction, we have considered the evidence and argument of record relating to Respondent's extensive gratis work for the Hispanic-American Multi-Center and many indigent clients. Professional service of this nature enhances the legal profession and brings credit to those who serve so willingly.

Id.

³³*In re Price*, 429 N.E.2d 961, 965-66 (Ind. 1982); *In re Deardorff*, 426 N.E.2d 689, 692 (Ind. 1981).

³⁴429 N.E.2d at 966.

public by permitting the Respondent to continue in the profession or be reinstated at some future date.³⁵

The court also considered an attorney's voluntary withdrawal from practice in determining the effective date of a disciplinary sanction. In *In re Thomas*,³⁶ an attorney had voluntarily withdrawn from the practice of law after a criminal conviction,³⁷ and, approximately 18 months later, the attorney was disbarred by order of the supreme court.³⁸ The court allowed the effective date of discipline to run from the time of the respondent's voluntary withdrawal for purposes of the five-year waiting period for reinstatement.³⁹

2. *Claims of Inadequate Counsel.*—During the survey period, numerous criminal defendants based appeals, at least in part, on the denial of effective legal representation at trial. In most instances, the appellate courts rejected the appellants' arguments and affirmed the convictions, applying established legal principles. For example, Indiana has long held to a presumption that legal counsel has acted effectively and competently.⁴⁰ Moreover, a criminal conviction will not be reversed on the basis of ineffective counsel, unless counsel's representation rendered the defendant's trial a "mockery of justice."⁴¹ During the past survey period, the supreme court consistently upheld the "mockery of justice" standard as modified by the "adequate legal representation" standard.⁴² In addition, the courts continued their reluctance to "second guess" defense counsel's trial tactics.⁴³

³⁵427 N.E.2d at 657.

³⁶420 N.E.2d 1237 (Ind. 1981).

³⁷The attorney was convicted of violating 21 U.S.C. § 843(b) (1976), which prohibits the use of a public communication facility to distribute cocaine.

³⁸420 N.E.2d at 1239.

³⁹*Id.*

⁴⁰See, e.g., *Field v. State*, 426 N.E.2d 671, 673 (Ind. 1981); *Lindley v. State*, 426 N.E.2d 398, 401 (Ind. 1981); *Harrison v. State*, 424 N.E.2d 1065, 1070 (Ind. Ct. App. 1981); *Myers v. State*, 422 N.E.2d 745, 752 (Ind. Ct. App. 1981).

⁴¹E.g., *Rice v. State*, 426 N.E.2d 680 (Ind. 1981); *Wilkins v. State*, 426 N.E.2d 61, 62 (Ind. Ct. App. 1981); *Roberts v. State*, 419 N.E.2d 803, 810 (Ind. Ct. App. 1981). See also cases cited *supra* note 40.

⁴²See, e.g., *Rice v. State*, 426 N.E.2d 680, 682 (Ind. 1981); *Lindley v. State* 426 N.E.2d 398, 409 (Ind. 1981). The "adequate legal representation" standard was described in *Thomas v. State*, 251 Ind. 546, 242 N.E.2d 919 (1969).

⁴³See *Lindley v. State*, 426 N.E.2d 398, 401 (Ind. 1981); *Roberts v. State*, 419 N.E.2d 803, 810 (Ind. Ct. App. 1981). In *Lindley*, the supreme court stated that it "will not speculate as to what may have been the most advantageous strategy in a particular case. Isolated poor strategy, bad tactics, or inexperience does not necessarily amount to ineffective counsel." 426 N.E.2d at 401. Similarly, in *Roberts*, the court of appeals stated that "[d]eliberate choices of attorneys for some tactical or strategic reason does not establish ineffective representation even though such choice may be subject to some criticism or even if it does turn out to be detrimental to the defendant." 419 N.E.2d at 810.

Nonetheless, post-conviction relief was granted twice during the survey period, based upon claims of ineffective representation by counsel. In *Shull v. State*,⁴⁴ the defense counsel had sought to impeach the testimony of the victim⁴⁵ by attempting to disclose a basis for negative feelings towards the accused or a motive for revenge.⁴⁶ Instead, the defense counsel "destroyed the credibility of his client much like a successful prosecution would have tried to do."⁴⁷

In reversing the defendant's conviction, the court of appeals emphasized the cumulative effect of the defense counsel's errors, stating:

We initially note that each error of counsel individually may not be sufficient to prove ineffective representation; however, the errors collectively illustrate the denial of his right to effective assistance of counsel. In applying the mockery of justice adequacy standard this Court must always look to the totality of the circumstances, [citations omitted] which would include consideration of the cumulative effect of counsel's errors. [citations omitted] Here, we have reviewed the entire record and conclude Shull was denied effective assistance of counsel based upon the totality of counsel's mistakes. While individual isolated mistakes may not be grounds for reversal, the totality of these circumstances requires reversal.⁴⁸

In *Cowell v. Duckworth*,⁴⁹ the petitioner sought a writ of habeus corpus after he had been tried and convicted of first-degree murder in state court and sentenced to life imprisonment. As one basis for his petition, the prisoner alleged that he had received ineffective legal representation at trial because his attorney had a conflict of interest. This allegation was based on the fact that the petitioner's attorney also represented two prosecution witnesses. The district court found that this was a conflict of interest that violated the petitioner's sixth amendment rights.⁵⁰ The court described the nature of this conflict as follows:

"The problem that arises when one attorney represents both the defendant and the prosecution witness is that the attorney

⁴⁴421 N.E.2d 1 (Ind. Ct. App. 1981).

⁴⁵The defendant had been convicted of child molesting.

⁴⁶Defense counsel asked such questions as: "How many times did he hit your mom?"; "How many times did he get drunk while he was staying at your house"; and, "Was the beer cold when he poured the beer on your brothers?" 421 N.E.2d at 2-3.

⁴⁷*Id.* at 3.

⁴⁸*Id.* at 2.

⁴⁹512 F. Supp. 371 (N.D. Ind. 1981).

⁵⁰*Id.* at 375. In this regard, the court held that "unconstitutional multiple representation is never harmless error." *Id.*

may have privileged imformation obtained from the witness that is relevant to cross-examination, but which he refuses to use for fear of breaching his ethical obligation to maintain the confidences of his client. See Code of Professional Responsibility, Can 4 & DR 4-101(B)(2). 'The more difficult problem which may arise is the danger that counsel may overcompensate and fail to cross-examine fully for fear of misusing his confidential information.' "⁵¹

Thus, the court held that the writ of habeas corpus would be issued unless the state retried Cowell within 180 days.⁵²

3. *Prosecutorial Misconduct.*—It has been firmly established in Indiana that the trial court is justified in granting a mistrial only where prosecutorial misconduct places a criminal defendant in a position of grave peril of conviction to which he should not have been subjected.⁵³

During the survey period, the "grave peril" standard was reaffirmed by the courts in several criminal cases where the appeal was based upon the denial of a motion for mistrial.⁵⁴ The court consistently rejected, however, the argument that a mistrial is the only appropriate remedy for prosecutorial misconduct. In *White v. State*,⁵⁵ the supreme court upheld the denial of a motion for mistrial because the appellant failed to demonstrate any adverse effect resulting from the alleged misconduct.⁵⁶ Similarly, in *Riley v. State*,⁵⁷ the court found that a prosecutor's failure to confine the content of his final argument to the facts of the case was improper; nonetheless, the court held that such conduct did not warrant reversal.⁵⁸

It may be generally concluded that absent a showing of harm resulting from the prosecutor's misconduct, the trial court's refusal to grant a mistrial for prosecutorial misconduct will not constitute reversible error.⁵⁹ Furthermore, "overwhelming direct evidence of . . . guilt" will be taken into consideration in determining the extent to

⁵¹*Id.* (quoting *Ross v. Heyne*, 638 F.2d 979, 983 (7th Cir. 1980)) (quoting *United States v. Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976)).

⁵²512 F. Supp. at 375.

⁵³See, e.g., *Drollinger v. State*, 408 N.E.2d 1228, 1240 (Ind. 1980).

⁵⁴See *Riley v. State*, 427 N.E.2d 1074, 1076 (Ind. 1981); *Brock v. State*, 423 N.E.2d 302, 305 (Ind. 1981); *Smith v. State*, 420 N.E.2d 1225, 1231 (Ind. 1981).

⁵⁵431 N.E.2d 488 (Ind. 1982).

⁵⁶*Id.* at 490.

⁵⁷427 N.E.2d 1074 (Ind. 1981).

⁵⁸*Id.* at 1076.

⁵⁹See, e.g., *Hines v. State*, 424 N.E.2d 161, 163 (Ind. Ct. App. 1981) (holding prosecutorial misconduct did not warrant granting of mistrial even though such conduct may violate the Code of Professional Responsibility).

which prosecutorial misconduct has placed a defendant "in a position of grave peril to which he should have not been subjected."⁶⁰

4. *Appellate Advocacy.*—During the survey period, the appellate courts of Indiana felt compelled to comment on the issues of competency and ethics as they relate to appellate advocacy. In *Moore v. State*,⁶¹ the court of appeals resorted to the extraordinary remedy of ordering the rewriting of an appellant's brief.⁶² Although the court refused to address the merits of the case, Judge Chipman, in reviewing the appellant's brief, authored a four-page opinion which outlined the counsel's most significant errors. The court found that the counsel for the appellant had committed mechanical errors and had failed to comply with several of the Indiana Rules of Appellate Procedure. In ordering a rebriefing, the court recognized the extraordinary nature of that remedy.⁶³ Nonetheless, the court found that such a remedy was "a more expedient method to guarantee appellant's constitutional right to effective assistance of counsel than perhaps future post conviction remedies."⁶⁴

*Gibbs v. State*⁶⁵ involved a more blatant breach of advocacy. In *Gibbs*, the court of appeals addressed the deficiencies of an appellate brief that was submitted by a public defender. In the brief, the public defender had reproduced a large portion of a co-defendant's brief, some of which was entirely adverse to his client's interest. The appellate court affirmed the defendant's conviction and referred the matter of the public defender's misconduct to the Supreme Court Disciplinary Commission for investigation.⁶⁶

In *Manns v. State*,⁶⁷ the court commented on the wholly inadequate brief submitted by the appellant's counsel. The court noted that appellant's counsel referred to various facts without a supporting citation to the record and failed to cite legal authority in support of the arguments presented. Nonetheless, the court undertook a review of the issues raised and subsequently affirmed the defendant's conviction.⁶⁸

The supreme court addressed another ethical aspect of appellate

⁶⁰Smith v. State, 420 N.E.2d 1225, 1231 (Ind. 1981) (quoting *Drollinger v. State*, 408 N.E.2d 1228, 1240 (Ind. 1980)).

⁶¹426 N.E.2d 86 (Ind. Ct. App. 1981).

⁶²*Id.* at 90.

⁶³*Id.* As to its authority to order a rebriefing, the court cited *Frances v. State*, 261 Ind. 461, 305 N.E.2d 883 (1974).

⁶⁴426 N.E.2d at 90.

⁶⁵426 N.E.2d 1150 (Ind. Ct. App. 1981).

⁶⁶*Id.* at 1159.

⁶⁷419 N.E.2d 1313 (Ind. Ct. App. 1981).

⁶⁸*Id.* at 1318. For an interesting comparison with *Manns*, see *Moore*, 426 N.E.2d 86 (Ind. Ct. App. 1981). See *supra* notes 61-64 and accompanying text.

advocacy in *Lance v. State*.⁶⁹ In *Lance*, the central issue was whether certain blood-stained clothing had been improperly seized. The state sought to defend the seizure under the "plain view" doctrine. In its brief, the state recited, as "fact," that a police officer "saw the defendant notice blood on the pants he picked up to put on and toss them aside nervously."⁷⁰ The supreme court found, however, that such a fact did not appear on the pages of the transcript cited by the state, "nor at any other location in the transcript."⁷¹ Citing the Code of Professional Responsibility, the court admonished the state's counsel by stating that "[p]ractitioners may properly place the facts in a light most favorable to their client. Zealous representation, however, does not include a license to misrepresent or embellish the facts."⁷²

In *Tippecanoe Education Association v. Board of School Trustees of Tippecanoe School Corp.*,⁷³ the court chose to use a footnote to emphasize an attorney's ethical obligation to disclose adverse authority in an appellate brief.⁷⁴ The court stated:

Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.⁷⁵

The court acknowledged that neither party cited the case that the court characterized as directly adverse to one of the party's position, thus raising the question as to whether the case was "directly adverse" as required by the Disciplinary Rules. The court's statement in *Tippecanoe* illustrates the need for care when an appellate tribunal seeks to substitute its judgment for that of the parties' counsel. The proper course of action would be to allow purported violations of the Code of Professional Responsibility to be determined by the Indiana Supreme Court Disciplinary Commission, and not by the court of appeals.

A significant development in the area of appellate advocacy is the supreme court's recent amendment of Appellate Rule 2 of the Indiana Rules of Appellate Procedure. The rule has been amended to provide

⁶⁹425 N.E.2d 77 (Ind. 1981).

⁷⁰*Id.* at 81.

⁷¹*Id.*

⁷²*Id.* (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (1979)).

⁷³429 N.E.2d 967 (Ind. Ct. App. 1982). The author's law firm represented the appellant in *Tippecanoe*.

⁷⁴*Id.* at 972 n.5.

⁷⁵*Id.* (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7, EC 7-23, DR 7-106(B)(1) (1979)).

for a pre-appeal conference.⁷⁶ Paragraph four of the amended rule states the following:

(4) If, without just excuse or because of failure to give reasonable attention to the matter, no appearance is made on behalf of a party at the pre-appeal conference, or if an attorney is grossly unprepared to participate in the conference, or unreasonably refuses to stipulate relevant record or facts necessary for the appeal, the Court of Appeals may order one of the following:

(i) the payment by delinquent attorney or the party of the reasonable expense, including attorney fees and the cost of the transcript, to the aggrieved party;

(ii) take such other action as may be appropriate under the circumstances.⁷⁷

The new rule thus places obvious responsibilities on the shoulders of appellate counsel, and it grants a great deal of discretion to the court of appeals in prescribing sanctions for the failure to meet those responsibilities.

B. Professional Liability

1. *Malicious Prosecution.*—An attorney's liability for malicious prosecution was addressed by the court of appeals in *Wong v. Tabor*.⁷⁸ Although the Indiana courts have recently restated the elements which are necessary to establish an action for malicious prosecution,⁷⁹ *Wong* represents the first discussion by an Indiana court of an action for malicious prosecution based upon an attorney's professional conduct.

In *Wong*, a physician, Wong, brought a malicious prosecution action against an attorney, Tabor, who had instituted a medical malpractice action against Wong on behalf of a client who had been severely injured during medical surgery. Tabor had filed the original action against the hospital, where the surgery was performed, and against

⁷⁶*In re the Adoption of Rules of Appellate Procedure, Order of the Supreme Court of Indiana, June 23, 1982.* The rule providing for a pre-appeal conference became effective on July 1, 1982. *Id.*

⁷⁷*Id.*

⁷⁸422 N.E.2d 1279 (Ind. Ct. App. 1981). For further discussion of this case, see Mead, *Torts, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 377, 407 (1983).

⁷⁹See *Satz v. Koplow*, 397 N.E.2d 1082 (Ind. Ct. App. 1979); *Yerkes v. Washington Mfg. Co.*, 163 Ind. App. 692, 326 N.E.2d 629 (1975). These cases hold that a plaintiff has the burden of establishing the following elements in an action for malicious prosecution: (a) the defendant instituted, or caused to be instituted, a prosecution against the plaintiff; (b) the defendant acted maliciously in doing so; (c) the prosecution was initiated without probable cause; and (d) the prosecution terminated in plaintiff's favor.

a number of doctors, including Wong. Although Wong had diagnosed the client's problem and had referred her to the performing surgeon, he had not taken part in the surgery that had caused the client's injuries.⁸⁰

During the malpractice litigation, Wong had applied to the trial court for summary judgment. Immediately prior to the hearing on the motion, one of Tabor's associates had advised Wong's attorney "that there would be no objection to the entry of summary judgment and to have the record merely reflect his presence at the hearing."⁸¹ After the hearing, summary judgment on the medical malpractice claim was granted in Wong's favor.

In Wong's subsequent malicious prosecution action against Tabor, the jury awarded Wong \$25,000 in damages. In his motion to correct errors, Tabor moved for judgment on the evidence. The trial court granted Tabor's motion, finding that the malpractice proceedings had not been terminated in plaintiff's favor, a favorable termination being a requisite element of an action for malicious prosecution, but had been terminated by agreement of the parties.⁸²

On appeal, Wong argued that the trial court erred in setting the verdict aside because the malpractice action had been terminated in Wong's favor; conversely, Tabor argued that the court was correct in its ruling.⁸³ The court of appeals found that the trial court erred in determining that the malpractice action had been terminated by agreement.⁸⁴ The court stated that Tabor's associate's decision to forego the opportunity to contest Wong's motion for summary judgment did not constitute a compromise and settlement.⁸⁵ Nonetheless, the court affirmed the trial court's holding for Tabor, "since the evidence is insufficient to support a finding that Tabor lacked probable cause to initiate a suit against Wong."⁸⁶

In addressing the issue of probable cause, the court initially noted that where the facts are uncontested, the question of probable cause is one of law to be decided by the court.⁸⁷ The court then proceeded to formulate a standard for determining whether there is prob-

⁸⁰Hospital records reveal that Wong's only involvement in the patient's hospital care was prescribing a laxative. 422 N.E.2d at 1282.

⁸¹422 N.E.2d at 1282.

⁸²*Id.*

⁸³Tabor was found to have preserved the following alternative arguments in his original motion to correct errors: (1) there was no evidence of lack of probable cause to bring suit against Wong; (2) no evidence as to malice was shown; (3) certain of the instructions were erroneously given; and (4) the damages were excessive.

⁸⁴422 N.E.2d at 1282.

⁸⁵*Id.* at 1285.

⁸⁶*Id.* at 1282.

⁸⁷*Id.* at 1285 (citing *Miller v. Willis*, 189 Ind. 664, 128 N.E. 831 (1920)).

able cause for an attorney's decision to bring suit on behalf of a client. The court began by emphasizing "that any standard of probable cause must insure that the attorney's 'duty to his client to present his case vigorously in a manner as favorable to the client as the rules of law and professional ethics will permit' is preserved."⁸⁸ The court elaborated by stating:

While an attorney is under an ethical duty to avoid suit where its only purpose is to harass or injure, if a balance must be struck between the desire of an adversary to be free from unwarranted accusations and the need of a client for undivided loyalty, the client's interests must be paramount.⁸⁹

After examining the competing viewpoints of various scholars and jurisdictions, the court adopted a two-level test for determining the existence of probable cause for instituting a lawsuit. First, an attorney must subjectively believe that a client's claim "merits litigation."⁹⁰ In addition, the attorney's belief must be reasonable under an objective standard described by the court as follows:

We conclude that the objective standard which should govern the reasonableness of an attorney's action in instituting litigation for a client is whether the claim merits litigation against the defendant in question on the basis of the facts known to the attorney when suit is commenced. The question is answered by determining that no competent and reasonable attorney familiar with the law of the forum would consider that the claim was worthy of litigation on the basis of the facts known by the attorney who instituted suit.⁹¹

Applying this new test to the facts at bar, the court found that Wong had failed to prove a lack of probable cause.⁹² Based upon the facts available to Tabor prior to the initiation of the lawsuit and the limited time in which he had to prepare and investigate, Tabor was found to have had a reasonable belief that his client's claim was meritorious.⁹³

⁸⁸*Id.* at 1286 (quoting *Weaver v. Superior Court*, 95 Cal. App. 3d 166, 180, 156 Cal. Rptr. 745, 752 (1979)).

⁸⁹422 N.E.2d at 1286. As to an attorney's duty to avoid instituting unwarranted actions, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102 (1979).

⁹⁰422 N.E.2d at 1288.

⁹¹*Id.*

⁹²*Id.* at 1289.

⁹³*Id.* The court found that Tabor had only thirty days to file the action prior to the expiration of the applicable statute of limitations. Taking this time constraint into consideration, the court concluded that there was a reasonable basis for Tabor's belief that Wong had been involved in Tabor's client's surgery and that Wong had negligently referred Tabor's client to the performing surgeon. *Id.*

The court rejected Wong's argument that Tabor should incur liability for wrongfully continuing the action once he discovered, or should have discovered, that Wong did not take an active part in the hospitalization which injured Tabor's client. Although the court chose not to discuss the conduct necessary to trigger liability for wrongful continuation of a civil proceeding, the court discussed two considerations which should be reflected in any rule of liability.⁹⁴ First, the court noted that the harm associated with the wrongful continuation of a proceeding differs from the damages suffered through malicious prosecution. In the former, the two principal injuries arising from malicious prosecution, adverse publicity and expense of counsel, "have already occurred and are not a basis for recovering damages."⁹⁵ Second, the court observed that the rules of trial procedure have adequate provisions for securing the dismissal of unwarranted claims and that the disciplinary rules vest the Supreme Court Disciplinary Commission with the power to discipline an attorney who unethically initiates or continues litigation.

The court concluded that "the considerations upon which liability may be predicated for wrongfully continuing an action when there existed probable cause for its commencement are quite narrow."⁹⁶ Accordingly, the court refused to premise liability on Tabor's failure to dismiss his client's action against Wong.⁹⁷

The ramifications of the *Wong* decision relate primarily to the subjective element of the probable cause test created by the court. While an attorney's subjective belief in the merit of a client's claim must be reasonable under an objective test, the belief need only be reasonable in light of the facts actually known by the attorney. The *Wong* court chose not to impose the "or should have known" standard often incorporated into objective tests. In addition, the court expressly rejected inadequate investigation as the basis for establishing a lack of probable cause, stating that "[w]hile we do not condone slack or shoddy preparation and investigation on an attorney's part in bringing suit, where there is *some factual basis* for bringing a claim, lack of probable cause cannot be based upon a negligent failure to investigate thoroughly."⁹⁸

In establishing the minimal "some factual basis" test, the court obviously weighed the potentially detrimental effect of discouraging thorough investigation against the need to protect the accessibility of the courts, and determined the latter to be the more important consideration.

⁹⁴422 N.E.2d at 1289.

⁹⁵*Id.* at 1290.

⁹⁶*Id.*

⁹⁷*Id.*

⁹⁸*Id.* at 1289 (emphasis added).

2. *Vicarious Liability for Punitive Damages.*—*Husted v. McCloud*⁹⁹ represents one of the most important developments in the area of professional liability to occur in recent years. In *Husted*, the Indiana Court of Appeals upheld the trial court's award of punitive damages against a law partnership. This award was made on the basis of an individual partner's misconduct.

The law firm of Husted & Husted¹⁰⁰ was retained to represent the estate of which Herman McCloud was executor. Edgar Husted was found to have converted more than \$18,000 from funds that had been advanced to McCloud to meet estate tax liabilities. Thereafter, Edgar entered into a plea agreement with the Montgomery County Prosecutor under which Edgar agreed to plea guilty to three counts of theft and one count of forgery involving three estates unrelated to the estate for which McCloud was executor. In return, the prosecutor agreed not to prosecute on charges arising from Edgar's disclosures of misconduct in any other estates. Edgar subsequently pleaded guilty to the four felony charges and was sentenced to prison. As a result of these previous actions, McCloud was forced to meet the estate tax liability with personal assets; thereafter, he filed an action against Edgar and the partnership of Husted & Husted seeking compensatory and punitive damages.

The court of appeals acknowledged the general rule that "punitive damages are not appropriate where the defendant is or may be subject to criminal prosecution for the same act;"¹⁰¹ however, the court held that Edgar's plea agreement released him from criminal liability thereby exposing him to liability for punitive damages.¹⁰² In finding that Edgar's conduct warranted an award of punitive damages, the court relied on the established principle that "[p]unitive or exemplary damages may be appropriate where there is a finding of fraud, malice, gross negligence, or malicious or oppressive conduct on the defendant's part."¹⁰³

In upholding a punitive damage award against the partnership, the court relied entirely on the Indiana Uniform Partnership Act which governs partnerships.¹⁰⁴ One section of the Indiana Act states:

[W]here, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is

⁹⁹436 N.E.2d 341 (Ind. Ct. App. 1982).

¹⁰⁰The firm consisted of Edgar and Selwyn Husted.

¹⁰¹436 N.E.2d at 344 (citing *Taber v. Hutson*, 5 Ind. 322, 325-27 (1854); *Moore v. Waitt*, 157 Ind. App. 1, 7-8, 298 N.E.2d 456, 460 (1973)).

¹⁰²436 N.E.2d at 345 (citing *Smith v. Mills*, 385 N.E.2d 1205 (Ind. Ct. App. 1979)).

¹⁰³436 N.E.2d at 344 (citing *Vaughn v. Peabody Coal Co.*, 375 N.E.2d 1159, 1163 (Ind. Ct. App. 1978)).

¹⁰⁴See IND. CODE §§ 23-4-1-1 to -43 (1982).

caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.¹⁰⁵

The court found that a "penalty" had been imposed against Edgar Husted in the form of punitive damages. Consequently, "[t]he application of the statute is clear—the partnership is liable [for punitive damages] to the same extent as the partner."¹⁰⁶

Another section of the Indiana Act also served as a basis for the court's decision. Section 23-4-1-14 provides that:

The partnership is bound to make good the loss: (a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and (b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.¹⁰⁷

Relying upon this code section, the court found that Edgar Husted's conversion of estate funds had occurred "within the ordinary course of partnership business" thereby subjecting the partnership to liability for punitive damages.¹⁰⁸ The court held that this liability attached regardless of a lack of knowledge on the part of the nonacting partner.¹⁰⁹ Furthermore, the court rejected the partnership's argument that there must be a specific finding that the public interest would be served by awarding punitive damages against the partnership.¹¹⁰

The *Husted* court's interpretation of the Indiana Act raises a number of questions. Clearly, the Indiana Act renders a partnership liable for any loss, injury, or penalty where a partner acts in the ordinary course of the business of the partnership or a partnership acts in the course of its business. However, the court found that Edgar Husted's act of criminally converting funds was performed within the ordinary course of that business, without discussing the nature of Husted & Husted's business.¹¹¹ Under the Indiana Act, a more

¹⁰⁵*Id.* at § 23-4-1-13.

¹⁰⁶436 N.E.2d at 347.

¹⁰⁷IND. CODE § 23-4-1-14 (1982).

¹⁰⁸436 N.E.2d at 347. In this regard, the court also found the partnership to be liable for compensatory damages under Indiana Code section 23-4-1-14. 436 N.E.2d at 348.

¹⁰⁹436 N.E.2d at 347.

¹¹⁰*Id.*

¹¹¹*Id.*

accurate description of Husted's conduct would be that it occurred while he was "acting within the scope of his apparent authority."¹¹²

Yet, even if the court properly found that Husted was acting within the scope of his apparent authority or in the ordinary course of the partnership's business, the use of either finding as a predicate for imposing punitive damages is extremely questionable. The Indiana Act states that the partnership is liable when, by the wrongful act or omission of a partner, "loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred."¹¹³ The *Husted* court grasps the "any penalty" language as a basis for the imposition of punitive damages against the partnership.¹¹⁴ However, this language clearly does not refer to a penalty incurred by a *partner* due to his wrongful act or omission, but to a penalty incurred by any person, *not a partner in the partnership*.

Similarly, section 23-4-1-14 cannot be interpreted so as to justify an award of punitive damages against a partnership. This section renders the partnership liable for a party's *loss*, if money is received and misappropriated by a partner or partnership. Having found that Edgar Husted converted funds while acting with apparent authority and within the course of the partnership's business, the court relied on section 23-4-1-14 in holding that "the partnership is liable and bound to make good the damages," including *punitive damages*.¹¹⁵ Obviously, section 23-4-1-14 mandates the partnership's obligation to contribute toward the funds which were misappropriated, or, in other words, "the loss." To find that punitive damages constitute part of "the loss" incurred by one whose funds are converted is contrary to Indiana's rationale for imposing punitive damages.

By establishing the proposition that an innocent, nonparticipating defendant may be held vicariously liable for punitive damages, the court of appeals has created a rule of law entirely inconsistent with current Indiana law. The *Husted* court itself recognized that "[p]unitive damages are not intended to compensate the claimant, but rather are intended to punish the wrongdoer and thereby deter others from engaging in similar conduct in the future."¹¹⁶ Punishing one who neither participated in the misconduct nor had any knowledge of it cannot be reconciled with Indiana's well-established rationale for awarding punitive damages.

¹¹²See IND. CODE § 23-4-1-14(a) (1982).

¹¹³*Id.* § 23-4-1-13.

¹¹⁴Holding that Edgar Husted had incurred "a penalty involving an award of punitive damages," the court held that the partnership was liable therefore to the same extent as the partner. 436 N.E.2d at 347.

¹¹⁵*Id.* (emphasis added).

¹¹⁶*Id.* at 344 (emphasis added) (citing *Hoosier Ins. Co. v. Mancino*, 419 N.E.2d 978 (Ind. Ct. App. 1981); *Nate v. Galloway*, 408 N.E.2d 1317 (Ind. Ct. App. 1980)).

Additional ramifications of *Husted* will be far-reaching. Incorporation by lawyers has traditionally failed to affect professional liability. However, it seems that incorporation would significantly weaken reliance upon Indiana's partnership laws as a basis for the imposition of punitive damages against a law firm.¹¹⁷ It is puzzling why the court in *Husted* utilized a somewhat strained interpretation of the Indiana Act instead of deciding this case within the bounds of established legal malpractice and agency law. Finally, this decision conflicts with established legal principles in another respect. Although courts have refused to allow individuals to contractually avoid or assign liability for punitive damages,¹¹⁸ *Husted* appears to stand for the proposition that one can contractually *subject* himself to liability for punitive damages via a partnership agreement.

¹¹⁷See Indiana Admission and Discipline Rule 27(c) which states:

Incorporation by two (2) or more lawyers associated in the practice shall not modify any law applicable to the relationship between the person or persons furnishing professional services and the person receiving such service, including, but not limited to, privileged communications which bind all associated, as well as the liability of each for all, arising out of the professional services offered by one (1) lawyer associated with others in the same corporation, as existed in a partnership for the practice of law.

IND. CODE. ANN. Title 34, app. Ind. R. Admiss. & Discp. 27(c) (West 1982).

¹¹⁸See generally Annot., 20 A.L.R.3d 335 (1968).

XIII. Property

WALTER W. KRIEGER*

During this survey period there were more than eighty decisions by state and federal courts that, to some degree, touched upon Indiana property law.¹ Many of these decisions, however, do not change or clarify existing law, nor do they present interesting applications of the law. These cases have either been excluded or summarized without extensive comment. The more significant cases are discussed under the following headings: (A) Adverse Possession; (B) Bailment; (C) Easements and Restrictive Covenants; (D) Landlord and Tenant; (E) Mines and Minerals; (F) Real Estate Transactions; and (G) Slander of Title. Cases not discussed under the above headings involved the following subjects: eminent domain,²

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¹There were no significant statutory developments during this survey period.

²In Oxendine v. Public Service Co., 423 N.E.2d 612 (Ind. Ct. App. 1980), the first district court of appeals held that Public Service Company of Indiana, Inc. (PSI) had made "good faith offers" prior to filing eminent domain actions against two landowners.

The trial court granted PSI's request for easements for a transmission line across two properties. On appeal, the landowners argued that the precondemnation offers were not made in good faith because the amounts offered were not based on actual characteristics, including improvements on the land. *Id.* at 615. The landowners further argued that the offers were not based on good faith opinions of fair market values, as required by Indiana Code section 32-11-1-2.1 (1982). *Id.*

The court of appeals rejected the landowners' first argument holding that failure to consider factors which affect damages and value "does not render the offer invalid as not being in good faith." 423 N.E.2d at 620 (citing *Wyatt-Rauch Farms, Inc. v. Public Service Co.*, 160 Ind. App. 228, 311 N.E.2d 441 (1974)). Additionally, the court noted that PSI employed an independent appraiser who applied certain accepted techniques to arrive at an offer and that although PSI made numerous contacts with the landowners, the landowners never expressed an opinion of value at the negotiation stage or at trial. 423 N.E.2d at 620.

The court of appeals also rejected the landowners second argument holding that the adoption in 1977 of the Uniform Land or Easement Acquisition Offer, which is found in Indiana Code section 32-11-1-2.1 (1982), did not require a precondemnation offer to be based upon fair market value. 423 N.E.2d at 621. The court came to this conclusion though the offer form in the statute contains the following sentence: "It is our opinion that the fair market value of the (property) (easement) we want to acquire from you is \$_____, and, therefore, _____ (condemnor) offers you \$_____ . . ." IND. CODE § 32-11-1-2.1 (1982).

Thus the court concluded that a precondemnation offer must be based only upon the reasonable value of the property, but not necessarily the fair market value. 423 N.E.2d at 619 (citing *Wampler v. Trustees of Indiana University*, 241 Ind. 449, 172 N.E.2d 67 (1961)); *See also Chambers v. Public Service Co.*, 265 Ind. 336, 355 N.E.2d 781 (1976).

In *Unger v. Indiana & Michigan Electric Co.*, 420 N.E.2d 1250 (Ind. Ct. App. 1981), the first district court of appeals was faced with the same "good faith offer" issue

joint bank accounts,³ and the Occupying Claimant

addressed in *Oxendine*. This time the court of appeals reached a different conclusion. In *Unger*, Indiana & Michigan Electric Co. (I. & M.) sought an easement over the property of Ruby Unger. I. & M. made Unger several offers before they tendered a uniform offer in accordance with Indiana Code section 32-11-1-2.1 (1982). The uniform offer was rejected and I. & M. filed an eminent domain action. At trial, the evidence showed that the I. & M. offers were determined by reference to a standard schedule of land values. 420 N.E.2d at 1251. The evidence further showed that an I. & M. agent based his opinion of the fair market value of the Unger property on the value which was accepted by other persons along the same route. *Id.* at 1252. There was no other appraisal of the Unger property.

The landowners appealed the trial court's denial of objections to the condemnation action. The critical issue before the court of appeals was "whether the trial court erred in concluding I. & M. made a good faith effort to purchase." *Id.* at 1254. As in *Oxendine*, the landowners argued that by enacting Indiana Code section 32-11-1-2.1 (1982) the legislature intended the condemnor to form an opinion of the fair market value of the land sought and to submit an offer based on that opinion prior to filing a condemnation action. The court in *Unger* agreed and held that "a condemnor must base its offer upon a stated opinion of the fair market value of the property sought." 420 N.E.2d at 1260. However, the court noted that a precondemnation offer need only be reasonable and a "conflict in opinion as to fair market value will be insufficient to sustain an objection to the complaint in condemnation." *Id.* The court concluded that reference to a state-wide schedule of damages without reference to the particular real estate was not a good faith offer to purchase. *Id.* at 1261. Therefore, the court in *Unger* held that "the trial court erred in overruling the landowners' objections that I. & M. had not made a good faith effort to purchase" and the trial court's order was reversed with "orders to dismiss the complaint in condemnation." *Id.*

³In *Blaircom v. Hires*, 423 N.E.2d 609 (Ind. 1981), Marie Van Blaircom and Maude A. Hires established a joint saving account. The deposit contract with the bank indicated that Maude and Marie were joint tenants with right of survivorship. *Id.* at 610. All the deposits were made with the funds of Maude, but the funds were physically deposited by Marie who retained the passbook. In 1974, Alva Hires was appointed guardian of the person and estate of his wife, Maude, and in January 1975, Alva demanded possession of the passbook. Instead, Marie withdrew all the funds from the account. Alva, as guardian, brought suit to recover the funds. The trial judge, now a judge on the Indiana Supreme Court, entered judgment in favor of the guardian. In an unpublished Memorandum Decision, the court of appeals reversed finding that where the rights of the parties are clearly established in a joint bank account by unequivocal language, the clear meaning of the language can not be varied by the admission of parol evidence. The court of appeals held that Marie and Maude had acquired all the rights incident to joint ownership and awarded Marie one half of the funds. In response to a petition to transfer, the Indiana Supreme Court divided equally on whether a petition to transfer should be granted; Justice Pivarnik, who was the trial judge below, disqualified himself. This left the decision of the court of appeals in full force and effect. *Id.* at 610.

In a dissenting opinion in which Justice Hunter concurred, Chief Justice Givan pointed out that Indiana Code section 28-1-20-1 (repealed 1980) was designed to protect the banks and was not intended to prevent designation of joint account interests by separate agreement between the parties. 423 N.E.2d at 611. Chief Justice Givan noted that, in some jurisdictions, parol evidence is not admissible after the death of one of the parties, but in the case at bar both parties were alive when the action was commenced. *Id.* at 611-12 (citing 10 AM. JUR. 2d Banks § 389 (1963)). This case was decided prior to the effective dates of Indiana Code sections 32-4-1.5-1 to -14 (1982) which now govern joint bank accounts. Under the current law, during the lifetime of

Act.⁴

A. Adverse Possession

A frequent factual situation arising in the area of adverse possession involves boundary line disputes between adjoining property

the cotenants, the account belongs to the parties in proportion to the net contributions by each to the sums on deposit. *Id.* § 32-4-1.5-3(a) (1982). At the death of one of the cotenants, the statute provides that “[s]ums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created.” *Id.* § 32-4-1.5-4(a). It would thus appear that the dissenting opinion will be followed in cases arising after the effective date of the statute.

In *Freson v. Combs*, 433 N.E.2d 55 (Ind. Ct. App. 1982), Millard and Fanny Combs brought an action to quiet title and for damages alleging that Ronald and Peggy Freson had unlawfully occupied and improved the Combs' property by building a house thereon. *Id.* at 57-58. The Combs also filed suit against John and Corabel Hopkins, who had deeded the land to the Fresons, and the Harrison Building & Loan Association, apparently a mortgagee. In their answer, the defendants asserted that under the Indiana Occupying Claimant Act, Indiana Code sections 34-1-49-1 to -12 (1982), they would be required to pay the Combs the fair market value of the land in its unimproved state if there was a judgment for the Combs. The court then tried the case under the Occupying Claimant Act. The jury returned a verdict in favor of the Combs and valued the land at \$2,000, which on appeal was reduced to \$1,500 to conform to the evidence. 433 N.E.2d at 58, 60-62. The Occupying Claimant Act is far more complicated than suggested by this case, and the particular way in which it was applied by the court in *Combs* might have been in error except for a post-trial motion filed by the Combs stating that it was never their intention to eject the Fresons from their home and that they only desired to be paid the value of their land which the Fresons occupy. *Id.* at 58.

The Occupying Claimant Act states that before the true owner can recover possession of his land against an occupying claimant who made improvements to the land in good faith and under color of title, the owner must comply with certain provisions of the Occupying Claimant Act. IND. CODE § 34-1-49-1 (1982). The court or jury trying the case must assess: (1) the value of the lasting improvements made by the occupying claimant; (2) the damages to the land caused by waste or cultivation by the occupying claimant; (3) the value of any rents and profits which might have been received by the occupying claimant from the land in its unimproved state (without improvements); (4) the value of the land without the improvements made by the occupying claimant; and (5) the taxes with interest paid by the occupying claimant and those under whose title he claims. *Id.* § 34-1-49-3. The court shall then give the true owner the option of paying the occupying claimant the value of his improvements plus the taxes paid, with interest, less the value of rents and profits received and any damages as assessed on the trial. *Id.* § 34-1-49-4. If the true owner shall fail to do so within a reasonable time fixed by the court, the occupying claimant can take the property by paying the true owner the value of the land without the improvements. *Id.* § 34-1-49-5. If this is not done within a reasonable time fixed by the court, the true owner and occupying claimant will be held as tenants in common. *Id.* § 34-1-49-6. In the case at bar, it is not clear whether all the assessments were made by the jury, and the court did not give the owner the first option as required by the statute. Nevertheless, the post-trial motion corrected any error by waiving the right to pay the Fresons the value of their improvements, and thus the Fresons had the option of paying the Combs the value of the land. For further discussion of this case see *Karlson, Evidence, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 191, 200 (1983).

owners. Through mutual mistake, a fence or other monument is treated as the true boundary line, and as a result one of the parties has been in possession of a strip of land belonging to the other for a period of time sufficient to invoke the doctrine of adverse possession. Two such cases were decided during this survey period.

In *Dowell v. Fleetwood*,⁵ the plaintiffs, Everett and Karen Fleetwood, purchased a one-acre tract of land in 1960. They regularly mowed the grass, cleared brush, and generally maintained their property to an existing fence which they believed to be the true boundary line. In 1975, the defendants, Alva and Evelyn Greathouse, purchased a contiguous five-acre tract. A survey conducted by the county surveyor established that the existing fence encroached 50.59 feet onto the Greathouses' property. The plaintiffs brought suit to quiet title. The trial court found in favor of the plaintiffs based on the theory of adverse possession, and the defendants appealed.

The first argument presented by the defendants was based on the fact that the plaintiffs had not paid taxes on the disputed strip of land. The defendants argued that the plaintiffs could not prevail because Indiana Code section 32-1-20-1 requires that the adverse possessor pay all the taxes on the land during the period he claims to have possessed the same adversely. This argument, as it relates to boundary line disputes, has been repeatedly rejected by the Indiana courts. Citing *Echterling v. Kalvaitis*,⁶ the *Fleetwood* court pointed out that if there has been an open, continuous, exclusive, adverse, and notorious possession of a contiguous strip of land for the statutory period of time, and if the taxes have been paid according to the tax duplicates, even though the duplicate does not include the disputed strip, then adverse possession is established to the strip. The adverse possessor who meets these criteria will be successful, though technically the taxes on the strip of land have not been paid by the adverse possessor.⁷ The court declined the Greathouses' invitation to overrule *Echterling*, noting that the *Echterling* decision preserves continuity of possession and supports stability in real estate titles.⁸

The second argument advanced by the defendants dealt with the sufficiency of the evidence. The defendants argued that mowing grass and general maintenance of the disputed area was not the type of open, continuous, exclusive possession that is necessary to acquire title by adverse possession. The court declined to reweigh the evidence and pointed out that mowing and maintaining property to a fence for the full period of the ten year statute of limitation for the recovery

⁵420 N.E.2d 1356 (Ind. Ct. App. 1981).

⁶235 Ind. 141, 126 N.E.2d 573 (1955).

⁷420 N.E.2d at 1358.

⁸*Id.*

of possession of real property has previously been held sufficient in Indiana.⁹

The second case, *McCarty v. Sheets*,¹⁰ presented a somewhat different factual situation than that involved in *Fleetwood*. The plaintiff, Russel McCarty, and the defendants, Carl and Anna Sheets, owned adjoining tracts of land. In 1937, a garage was erected on the defendants' land by their predecessor in title. The garage, situated on the side boundary line approximately midway between the front and rear lot lines, encroaches upon the McCarty property 1.4 feet at the rear end of the building and 2 feet at the front end. The eaves of the garage encroach an additional 1 foot. The evidence showed that from 1956 until 1973 the defendants cut the grass, maintained the area around the garage, and paid all taxes on their property including the taxes assessed against the garage. When McCarty brought an action to require the defendants to move their garage, the defendants counterclaimed to quiet title. The trial court entered judgment against the plaintiff and for the defendants on their counterclaim, quieting title to a strip of land 4 foot 2 inches wide and 150 feet in length along the entire east side boundary of the plaintiff's land. The court of appeals affirmed the judgment of the trial court and the plaintiff filed a petition to transfer.¹¹ The Indiana Supreme Court vacated the decision of the court of appeals, affirmed the denial of relief to the plaintiff, but reversed and remanded the case as to the relief granted the defendants.¹²

Both the supreme court and the court of appeals found relevant the testimony of the defendant, Carl Sheets, regarding the acts of possession upon which his claim was based. After examining this testimony, the supreme court concluded,¹³ as had the dissent in the court of appeals decision,¹⁴ that at best the testimony indicated that Sheets did some yard work on the side of the garage and behind the garage, but that there was absolutely no evidence that he did anything to the strip of land along the whole side of McCarty's land. The court found that the evidence only supported awarding the defendants the land actually occupied by their garage and a prescriptive easement to maintain the eaves of their garage as presently located.¹⁵ While

⁹*Id.* at 1359 (citing *Ford v. Eckert*, 406 N.E.2d 1209 (Ind. Ct. App. 1980)).

¹⁰423 N.E.2d 297 (Ind. 1981).

¹¹*Id.* at 298.

¹²*Id.* at 301.

¹³*Id.* at 300.

¹⁴*McCarty v. Sheets*, 391 N.E.2d 834, 838 (Ind. Ct. App. 1981) (Hoffman, J., dissenting). For a discussion of the court of appeals decision in *McCarty*, see Krieger, *Property, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 459, 466-67 (1981).

¹⁵423 N.E.2d at 301.

the decision in *McCarty* rests on a narrow point, that is the failure to prove acts of possession along the entire boundary line, there is language in the decision that suggests that the court will not find maintenance activities in a residential area sufficient to support a claim to adverse possession where there are no fixed or established boundary lines such as a fence or other monument.¹⁶

B. Bailment

Carr v. Hoosier Photo Supplies, Inc.,¹⁷ decided during this survey period, establishes that the Uniform Commercial Code will not extend to cases involving bailment for services. John Carr, an attorney and amateur photographer, purchased ten rolls of Eastman Kodak Company film to be used on a trip to Europe. Each roll of film had a "notice" printed on the package that stated that if the film was defective or if "damaged or lost by us or any subsidiary company even though by negligence or other fault," the film would be replaced. "Except for such replacement," the notice continued, "the sale, processing, or other handling of this film for any purpose is without other warranty or liability."¹⁸

Upon returning home from the European trip, Carr took nine rolls of exposed Kodak film to Hoosier Photo for processing. The receipt for the film which Carr received from Hoosier Photo also contained a "notice" on the back. The notice stated that

[a]lthough film price does not include processing by Kodak, the return of any film or print to us for processing . . . will constitute an agreement by you that if any such film or print is damaged or lost by us or any subsidiary company, even though by negligence . . . it will be replaced . . . and except for such replacement, the handling by us . . . is without other warranty or liability.¹⁹

Only five of the nine rolls of Kodak film were returned to Carr; the others were lost by either Kodak or Hoosier Photo. Carr filed suit against Kodak and Hoosier Photo asking for \$10,000 in damages, which would include the cost of returning to Europe to retake the

¹⁶*Id.* at 300-01. Cf. *Penn Cent. Transp. Co. v. Martin*, 170 Ind. App. 519, 353 N.E.2d 474 (1976) (erecting permanent structures and thereafter mowing grass and erecting improvements held sufficient to establish adverse possession); *Smith v. Brown*, 126 Ind. App. 545, 134 N.E.2d 823 (1956) (establishing hedge fence, trimming shrubbery, mowing grass and planting flowers held sufficient to establish adverse possession).

¹⁷422 N.E.2d 1272 (Ind. Ct. App. 1981), *rev'd*, No. 1182 S 426 (Ind. Nov. 12, 1982). For further discussion of this case see *Bepko, Commercial Law, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 83, 90 (1983).

¹⁸422 N.E.2d at 1274.

¹⁹*Id.*

photos. Kodak and Hoosier Photo claimed that because of the limitation of liability clauses contained on both the film packages and the receipt, Carr's recovery should be limited to \$13.60.²⁰ The trial court awarded Carr \$1,013.60 and all parties appealed. The court of appeals affirmed the judgment of the trial court.²¹

The primary issue addressed by the court of appeals was whether the film processing transaction should be governed by the Uniform Commercial Code as was claimed by the defendants, Kodak and Hoosier Photo. The defendants advanced two arguments to support this contention. The first argument was that the limitation of liability clause on the film box, which related to film processing, was sufficient to bring the processing transaction within the ambit of the UCC. The court of appeals summarily rejected this argument.²²

The second argument advanced by the defendants was that this service transaction is analogous to a leasing arrangement, which type of arrangement has been held in Indiana as covered by the UCC.²³ The court of appeals, however, found that "there is a distinction between a bailment which arises from the lease of personal property and a bailment which arises from the service transaction."²⁴ The distinction the court drew lies in the fact that one who leases personal property has the use of that property for a specified time. The bailee who is to perform a service upon the personal property in his possession, however, does not have the use of the personal property. The court of appeals thus found that to extend the scope of the UCC to cover service transactions would be to "distort the language of the U.C.C."²⁵

Hoosier Photo and Kodak advanced a separate argument on the damages question. The argument was that neither defendant accepted the images on the film for bailment and that it would be unfair to hold them liable for the value of the exposed film. In rejecting this argument, the court noted that this was not a case where unexpectedly valuable objects are placed in a car trunk or left inside a suitcase without the knowledge of the bailee, in which case the bailee would not be liable for the loss.²⁶ In this case, both Hoosier Photo and Kodak

²⁰*Id.*

²¹*Id.*

²²*Id.* at 1275.

²³*Id.* at 1277. See McDonald's Chevrolet, Inc. v. Johnson, 176 Ind. App. 498, 376 N.E.2d 106 (1978).

²⁴422 N.E.2d at 1275.

²⁵*Id.* at 1276. But see *Mieske v. Bartell Drug Co.*, 92 Wash. 2d 40, 593 P.2d 1308 (1979). In *Mieske*, the Supreme Court of Washington held that the UCC applied to film processing. *Id.* at 47-48, 593 P.2d at 1312. The court in *Mieske* found that the UCC application to "transactions in goods" was intended by the drafters to include a broad spectrum of sales and transactions including a bailment for services. *Id.*

²⁶422 N.E.2d at 1278.

were aware that the film was exposed and that the images on it made it more valuable than unexposed film.

C. Easements and Restrictive Covenants

Two easement cases decided during this survey period warrant comment.²⁷ In *Hartwig v. Brademas*,²⁸ there was an express easement for drainage of surface water that was reserved in a deed from 100 Center Company to T. Brooks Brademas in favor of Sedgwick House, a limited partnership that had previously purchased an apartment house on an adjoining tract of land from 100 Center Company. When the apartment house owned by Sedgwick was built, a subterranean spring was uncovered. Therefore, a drainage system was constructed to carry off the spring water, the runoff from the roof, and the water from the floor drains. The system ended north of the apartment house, on land now owned by Brademas. When the land was sold to Brademas, the deed created an easement in favor of Sedgwick "for the drainage of surface waters and waters discharged from the roof and floor drains of 'Sedgwick House' over, along and across the following described real estate: [The description of Easement Z]."²⁹

²⁷Another case in this area is *Ellis v. George Ryan Co.*, 424 N.E.2d 125 (Ind. Ct. App. 1981). Suit was brought by George Ryan Co., Inc. for declaratory judgment to determine the validity of a restrictive covenant that, if valid, would prohibit Ryan from building a proposed six-story condominium. *Id.* at 126. The trial court found for Ryan on two separate grounds: the covenant was void because it was not signed by all of the property owners, and there had been a waiver of the enforcement of the restrictions because of the acquiescence of the property owners in numerous violations of the covenant. *Id.* The court of appeals affirmed. *Id.* at 127.

Prior to *Ellis*, the court of appeals had held that, absent a showing that the contract is not to be deemed complete unless signed by all the parties, the parties signing may be bound even though others have not signed. *Curtis v. Hannah*, 414 N.E.2d 962, 963 (Ind. Ct. App. 1981). In *Ellis*, the court found that the covenant was void because it "speaks in terms of 'all parties hereto.'" 424 N.E.2d at 126. Moreover, the court noted that the intent that the contract was not complete unless signed by all parties can be found from the fact that the parties did not comply with the covenants. *Id.* at 127.

What is troublesome about the court's conclusion that the parties had waived the covenant because of prior violations is the fact that the violations were of a minor nature. The violations cited by the court were: occasional use of a mobile home as a residence, building of an additional house on one of the lots, building a doghouse and garages, construction of various outbuildings, use of a chicken house, use of a house as an office, and holding church meetings in a residence. *Id.* at 126. What property owner who is living in an area restricted to single family dwellings would believe that he must bring legal action against a neighbor who occasionally parked a mobile home on his lot, held church meetings in his home, raised a few chickens, or built a garage on his lot in order to assure that he has not "waived" a covenant which could result in the construction of a six-story condominium?

²⁸424 N.E.2d 122 (Ind. Ct. App. 1981).

²⁹*Id.* at 123.

The drainage system, however, crossed through Easement Z and deposited the water north of Easement Z preventing the development of the land. Brademas brought an action seeking injunctive relief and damages. The trial court permanently enjoined Sedgwick from trespassing on the property of Brademas and awarded Brademas \$8,800 damages for the two years he had been unable to develop the land. Sedgwick appealed.³⁰

Sedgwick argued that the easement should not be limited to the area described in Easement Z. In a rather novel argument, Sedgwick claimed that in addition to the reserved easement, there was also an implied easement that was created at the time the land was severed because there was an apparent and obvious servitude in favor of the dominant estate, Sedgwick House, which was reasonably necessary for its use and enjoyment. The court noted that in order to find an implied easement "the servitude must be (1) obvious, (2) permanent, (3) in use at the time ownership in the land is severed, and (4) reasonably necessary for the fair enjoyment of the party benefited, not merely convenient or beneficial."³¹ The court found that Sedgwick had failed to prove two essential elements: that the servitude was permanent, and that it was reasonably necessary.³² As to its permanency, the court noted that the testimony of the construction superintendent for the apartment house indicated that allowing the water to dissipate onto the Brademas land was only a temporary situation, which would be remedied when an open ditch could be constructed to the river.³³ As to whether the servitude was reasonably necessary for the enjoyment of the estate, the court remarked that several alternative methods were available to Sedgwick for disposing of its water.³⁴

Sedgwick also argued that the reserved easement should not be limited to the described area. This argument was summarily rejected by the court of appeals. If an area outside the described easement was intended, it should have been included in the area of the drainage easement. The court in *Brademas* found that the inclusion of one area as an easement is the exclusion of all others.³⁵ Therefore, based on its findings, the appellate court affirmed the judgment of the trial court.³⁶

One of the more factually complicated decisions reported during

³⁰*Id.*

³¹*Id.* at 124 (citing *Searcy v. LaGrotte*, 175 Ind. App. 498, 372 N.E.2d 755 (1978)).

³²424 N.E.2d at 124.

³³*Id.*

³⁴*Id.* at n.4.

³⁵*Id.* at 124.

³⁶*Id.* at 125.

this survey period is *Enderle v. Sharman*.³⁷ While the legal issues raised are not themselves complicated, the factual context of this case is difficult. William and Sallie Ijams were the common owners of a tract of land subsequently divided into four tracts. In 1916, the Ijams entered into an agreement with an adjoining property owner, Julia Donham, for an easement across the Donham property. The purpose of the Ijams-Donham agreement was to provide the Ijams with an access to a public road, now State Highway 41. The easement expressly stated that the Ijams desired to subdivide the land into lots, streets, and alleys and to sell the land for residential purposes, and for establishment of a country club. In 1917, the Ijams conveyed a portion of the land, now Tracts III and IV, to the Terre Haute Country Club and retained title to the remaining portion of the land, now Tracts I and II. At the time of this conveyance, there was a road running through the Ijams' land which is now known as Country Club Road. The deed provided that both the grantor and the grantee, their heirs and assigns, could use the roadway, "each having a common and not exclusive right to use same perpetually."³⁸ The deed also incorporated by reference the Ijams-Donham agreement, and a copy of the agreement was attached to the deed. While the facts only discuss Country Club Road in relation to the Ijams' land, it would appear that the road continues in a westerly direction across the Donham's land to Highway 41, and that its use by the owners of Tracts I and IV is necessary in order to use the right of way set forth in the Ijams-Donham agreement.

The Ijams died intestate and the land retained by them, Tracts I and II, passed to their three children, Jessee Ijams, Alice Ijams Benbridge and Frank Ijams. In 1929, Jessee Ijams and Alice Ijams Benbridge, together with her husband, conveyed their interests in Tract II to Helen Ijams, the wife of Frank Ijams, but the conveyors specifically retained an easement over Country Club Road. Frank Ijams later died and his interest in Tract II passed to Helen Ijams, his wife. In 1937, the Country Club conveyed Tract III to Helen so that Helen Ijams ultimately became the owner of Tracts II and III.

The history of Tract I was different. In 1930, Jessee Ijams conveyed his interest in Tract I to other cotenants, Frank Ijams and Alice Ijams Benbridge. In 1956, Frank Ijams and Alice Ijams Benbridge conveyed Tract I to Alice Ijams Williams and her husband, John Williams. Alice Ijams Williams subsequently divorced her husband and reconveyed her interest to herself under the name Alice I. Sharman. Alice Sharman's exact relation to the Ijam family is not stated, but

³⁷422 N.E.2d 686 (Ind. Ct. App. 1981).

³⁸*Id.* at 693.

the facts indicate that she was co-executor and heir of the estate of Helen Ijams.

When Helen Ijams died, the plaintiffs, Frank and Kay Enderle purchased Tract II from the co-executors of her estate and subsequently purchased Tract III from the Helen Ijams' estate. Later, when Alice I. Sharman died, Fereydoon B. Boushehry entered into an agreement to purchase Tract I from the co-executors of her estate. Boushehry claims an easement over Tracts II and III appurtenant to Tract I, and the Enderles brought this action to quiet title. The action was referred to a special master. The co-executors of the estate of Alice Sharman and Boushehry moved for summary judgment and, after a hearing was held, the master recommended the motion be granted. The trial court adopted the findings of fact and conclusions of law recommended by the master and the Enderles appealed.

The major substantive issue raised on appeal was the trial courts finding that there was an easement over Tracts II and III appurtenant to Tract I. The trial court found that the conveyance to the Country Club in 1917 created an easement over Tract III.³⁹ It is important to remember that the Ijams retained title to Tract I and the deed expressly reserved the right to use the road by the grantors. The court noted, however, that the 1917 deed did not create an easement across Tract II since this tract was still owned by the Ijams and it is a rule of law that an owner cannot possess an easement in his own land.⁴⁰

The trial court found an easement over the portion of the road which lies in Tract II on two separate grounds. First, there was an easement by reservation contained in the 1929 deed from Jessee Ijams and Alice Ijams Benbridge conveying Tract II to Helen Ijams.⁴¹ In a rather confusing argument, the Enderles claimed that the deed did not create an easement by reservation because there can be no reservation in a stranger.⁴² While the court answers this argument by citing *Brademas v. Hartwig*,⁴³ which recognizes the right of a grantor to convey an easement by reservation to a party who is a stranger to the transaction, the fact is that the persons from whom defendants claim title to Tract I were not strangers to the transaction but were the grantees. The Enderles also argued that the reservation was not effective because one of the cotenants did not convey his interest in Tract I. This is further complicated by the fact that this cotenant is the husband of the grantee. The court could not see how the reserva-

³⁹*Id.* at 692.

⁴⁰*Id.* at 693.

⁴¹*Id.* at 690.

⁴²*Id.* at 693.

⁴³175 Ind. App. 4, 369 N.E.2d 954 (1977).

tion of an easement over Tract II by the two cotenant grantors in any way diminished the rights of the third cotenant, who did not need an easement because he still retained an interest in both tracts.⁴⁴

In addition to an easement by reservation, the trial court found that an implied easement across Tract II existed, based on the Ijams-Donham agreement.⁴⁵ Citing *John Hancock Mutual Life Insurance Co. v. Patterson*,⁴⁶ the court of appeals noted that where there exists, during the unity of title, a permanent and obvious servitude that is imposed on one part of an estate in favor of another, and, at the time of severance, the servitude is in use and is reasonably necessary for the fair enjoyment of the other part of the estate, there arises by implication of law a grant or reservation of the right to continue such use.⁴⁷

The Enderles objected to the trial court's use of the Ijams-Donham agreement to find an intent to create an easement over Tract III in the 1917 deed to the Country Club and to find an implied easement across Tract II. While the court of appeals agreed with the Enderles that the Ijams-Donham agreement only created an easement over the Donham's land and not the Ijams' land, which was the dominant estate, the court did not agree with the Enderles' conclusion that it was erroneous to rely upon the agreement in construing the other conveyances.⁴⁸ It is hard to follow the Enderles' argument on this point. Clearly Country Club Road exists because of the easement and, from the facts, exists for no other reason. Without the Ijams-Donham agreement, the use of Country Club Road would not be reasonably necessary for the use and enjoyment of Tract I.⁴⁹

Finally, the Ijams-Donham agreement became relevant with regard to the scope of the easement. The Enderles argued that to allow Boushehry to subdivide Tract I would create an undue burden of the servient estates, Tracts II and III. In answering this argument, the court noted that the Ijams-Donham agreement provided that the Ijams intended to subdivide the land into lots and streets for residential purposes. Because the agreement is incorporated by reference into many subsequent conveyances, residential development must have been contemplated by the parties when the easement was created.⁵⁰

⁴⁴422 N.E.2d at 694.

⁴⁵*Id.*

⁴⁶103 Ind. 582, 2 N.E. 188 (1885).

⁴⁷422 N.E.2d at 694.

⁴⁸*Id.* at 693.

⁴⁹It does not appear that Tract I is landlocked. Otherwise, the parties would have argued a way of necessity.

⁵⁰422 N.E.2d at 695.

D. Landlord and Tenant

There are three types of leasehold estates recognized at common law: an estate for years, an estate from period to period, and an estate at will.⁵¹ An estate at will is created whenever the lease can be terminated at the will of the lessor.⁵² While it can be created by express contract, it often occurs when a person takes possession of the land with the consent of the owner under an oral lease or a contract for sale which can not be enforced because of the statute of frauds.⁵³ One of the most important common law characteristics of the tenancy at will is that it can be terminated at any time by either party without notice.⁵⁴

The second type of leasehold estate is the estate for years or tenancy for a term of years. Any lease for a fixed term is called an estate for years even though the length of the terms is less than a year, such as a week or six months.⁵⁵ At the end of the term, the estate automatically comes to an end, and, absent a provision in the lease to the contrary, no notice of termination is required by either landlord or the tenant.⁵⁶

The third type of leasehold estate is known as the estate from period to period or periodic tenancy. It is also referred to as a tenancy from year to year, even though the period may be from week to week or month to month.⁵⁷ This type of tenancy has no fixed termination date and will continue from period to period until one of the parties gives notice of termination. At common law, if the tenancy period was six months or longer, a six months notice was required, and if the tenancy period was less than six months, the notice had to be as long as the tenancy period itself and given at the beginning of a new period.⁵⁸ Today in most states the notice requirements are covered by statute.⁵⁹

The case of *Edward Rose of Indiana v. Fountain*⁶⁰ emphasizes a

⁵¹W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY 123-34 (3d ed. 1965); J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 53-56 (2d ed. 1975).

A fourth type of estate, a tenancy at sufferance, was really not an estate but a term used to describe the situation in which a tenant remains in possession after the termination of a leasehold estate. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 85-86 (1962).

⁵²CRIBBET, *supra* note 51, at 56-57.

⁵³BURBY, *supra* note 51, at 125-126; MOYNIHAN, *supra* note 51, at 85-86.

⁵⁴CRIBBET, *supra* note 51, at 56.

⁵⁵*Id.* at 53.

⁵⁶*Id.*

⁵⁷BURBY, *supra* note 51, at 128.

⁵⁸CRIBBET, *supra* note 51, at 54.

⁵⁹See BURBY, *supra* note 51, at 132; MOYNIHAN, *supra* note 51, at 80.

⁶⁰431 N.E.2d 543 (Ind. Ct. App. 1982).

potential problem in the wording of the Indiana statutes that govern notice of termination and also raises other interesting issues regarding the termination of leasehold estates. The plaintiff, C. Wayne Fountain, leased an apartment from the defendant, Edward Rose, for a term of six months. Normally, no notice of termination would have been required, but the written lease provided that "before the expiration of the term of this lease, the tenant shall give the Landlord at least thirty (30) days written notice in any one calendar month of his intention to surrender said premises."⁶¹ The lease further provided that if such notice was not given, the tenant would be liable for an additional month's rent.

To understand the purpose for the notice provision, it should be noted that the lease did not operate like a tenancy for a fixed term. At the end of the term, the lease became a tenancy from month to month requiring both parties to give notice of termination, and the lease gave the lessee rights in addition to those he would have had as a tenant at sufferance.⁶² Thus, there was a valid reason why the landlord needed notice because the tenancy would not automatically terminate at the end of the six-month period.

Prior to the end of the term, Rose notified Fountain by letter of his obligation under the lease to give notice of termination.⁶³ Fountain ignored the letter and moved out at the end of the term without giving notice. Rose retained Fountain's \$150 security deposit as liquidated damages for breach of the notice of termination covenant in the lease. Fountain brought suit to recover his security deposit, and the trial court entered judgment in favor of Fountain, holding that notice was not required by statute.⁶⁴ Rose appealed and the court of appeals reversed.⁶⁵

The court of appeals noted that even if Indiana Code section 32-7-1-7 applied, the parties were free to provide for notice of termination in the lease agreement. Moreover, the court noted that this code section deals solely with the landlord's obligation to give notice to the tenant. In fact, the court pointed out that "[a]bsent from those

⁶¹*Id.* at 544 n.2.

⁶²See BURBY, *supra* note 51, at 128; MOYNIHAN, *supra* note 51, at 85.

⁶³It is not clear if the letter was sent in time to inform Fountain of his duty while there was still time to comply with the provision. If not, then an issue of unconscionability could have been raised. A person signing a lease for a fixed term would assume that the lease would come to an end automatically and would not be looking for such a clause in the lease. A court might find such a notification provision unconscionable unless the provision was clearly labeled and not buried in fine print, or brought to the attention of the lessee. See *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971).

⁶⁴431 N.E.2d at 545 (citing IND. CODE § 32-7-1-7 (1982)).

⁶⁵431 N.E.2d at 546.

code provisions is any reference to a tenant's obligation to give notice of his intent to surrender leased premises."⁶⁶

Thus, the court in *Fountain* calls to our attention a potentially serious problem regarding notification requirements that surprisingly has existed for over 100 years. Clearly, the problem could arise in two situations. Indiana Code section 32-7-1-2 changes the common law rules regarding a tenancy at will and provides that "[a] tenancy at will can not arise or be created without an express contract"⁶⁷ and Indiana Code section 32-7-1-1 provides that the landlord may terminate an estate at will "by one (1) month's notice in writing, delivered to the tenant."⁶⁸ Because there was no notice requirement at common law to terminate a tenancy at will,⁶⁹ and the statute seems to exclude any notice requirement on the part of the tenant, it is difficult to see how a court would impose such a duty on the tenant.

The problem could be more serious when dealing with periodic tenancies. Indiana Code section 32-7-1-3 provides that "[a]ll tenancies from year to year, may be determined by at least three (3) months' notice given to the tenant prior to the expiration of the year; and in all tenancies . . . of less than three (3) months' duration, a notice equal to the interval between such periods shall be sufficient."⁷⁰ Although the statute again fails to impose any duty on the part of the tenant to give notice, in this instance the statute is in derogation of the common law.⁷¹ While there are no cases that directly address this problem, in a 1978 Indiana Attorney General's Opinion, the Attorney General stated that the notice requirements in the statute on termination of periodic tenancies applies equally to the tenant and the landlord.⁷²

Perhaps the problem caused by the wording of the statutes governing notice of termination has not arisen because most standard leases creating a periodic tenancy contain a provision requiring the tenant to give notice of termination, or because in situations where there is not a written lease, the amount of money involved is so trivial that the landlord suffers the loss or keeps the security deposit as liquidated damages, and neither party is willing to adjudicate the issue. It should

⁶⁶*Id.* at 545. Landlord and tenant relations are covered in Indiana Code sections 32-7-1-1 to -18 (1982). Code sections pertaining specifically to notices to quit are covered in Indiana Code sections 32-7-1-3 to -8 (1982).

⁶⁷IND. CODE § 32-7-1-2 (1982).

⁶⁸*Id.* § 32-7-1-1.

⁶⁹See CRIBBET, *supra* note 51, at 56.

⁷⁰IND. CODE § 32-7-1-3 (1982).

⁷¹As a general rule, where a statute is found to be in derogation of the common law, it should be construed so as not to change the common law. *See Helms v. American Sec. Co.*, 216 Ind. 1, 6, 22 N.E.2d 822, 824 (1939).

⁷²1978 Op. Att'y Gen. 61, 62.

be noted that in the case at bar there was a provision in the lease allowing the landlord to apply the security deposit "upon rent or other charges in arrears or upon damages for Tenant's failure to perform the said covenants, conditions or agreements."⁷³ The court in *Fountain* stated that such provisions, which require the lessee to deposit with the lessor a sum of money as security for the performance of covenants of the lease, are valid and enforceable.⁷⁴

E. Mines and Minerals

Two significant cases involving the interpretation of mineral deeds were decided during the survey period.⁷⁵ The first case, *Lippeatt v.*

⁷³431 N.E.2d at 545 n.3.

⁷⁴*Id.* at 546.

⁷⁵There were two United States Supreme Court decisions in this area which deserve mention, although the cases deal primarily with constitutional law issues. In *Texaco, Inc. v. Short*, 102 S. Ct. 781 (1982), *aff'g* 406 N.E.2d 625 (Ind. 1980), the Court upheld the constitutionality of Indiana's Dormant Mineral Act (Act), IND. CODE §§ 32-5-11-1 to -8 (1982). (Note that sections -4, -5, -7, and -8 of the Act were amended in 1982 to include minor language changes.) The Act provides that a mineral interest that has not been used for a period of twenty years shall be extinguished and shall revert to the surface owner, unless the owner of the interest files a statement of claim in the Dormant Mineral Interest Record in the county recorder's office prior to the expiration of the twenty year period of nonuse. IND. CODE §§ 32-5-11-1 to -8 (1982). However, there is a provision in the Act that exempts from the operation of the Act those owners with ten or more separate mineral interests in a county who have made a good faith effort to record all the interests. IND. CODE § 32-5-11-5 (1976) (amended 1982). The court found that Indiana had legitimate state goals, such as the encouragement of mineral development and the collection of property taxes, that justified enactment of the statute. 102 S. Ct. at 792. Because owners of multiple interests are more likely to be able to engage in the actual production of mineral resources, there was justification for giving those owners special treatment under the Act; therefore, the Act did not violate the equal protection clause. *Id.* at 797. The Court also concluded that there was no violation of the fourteenth amendment because there was no "taking" of property without just compensation; it was the nonuse by the owner and his failure to file a statement of claim which caused the abandonment of the interest and not state action. *Id.* at 792. In resolving this case, the Court seemed to emphasize the fact that the Act provided a two-year period of grace after the effective date to file claims, which would otherwise have been extinguished. *Id.* at 788-89.

The Indiana Marketable Title Act may be of interest to abstractors and others conducting title searches. The Act, IND. CODE §§ 32-1-5-1 to -10 (1982), provides that a person shall have marketable record title to any interest in land if he can trace an unbroken chain of title back to a root of title at least fifty years old. IND. CODE § 32-1-5-1 (1982). Interests in the land created prior to the root of title, with some important exceptions, were void unless recorded within the chain of title in the Notice Index in the county recorder's office. IND. CODE §§ 32-1-5-2 to -6 (1982). This Act does not appear to cover mineral "interests" created prior to the root of title because the mineral estate would exist separate and apart from the surface estate. The Dormant Mineral Act may prove useful in clearing title to property by extinguishing old, unused mineral claims.

Comet Coal & Clay Co.,⁷⁶ illustrates the classic case of a latent ambiguity in the terms of a deed.⁷⁷ In 1919, the Vandalia Coal Company executed a deed to plaintiff's grandfather conveying "[t]he sixth (6th) or surface vein of coal only" underlying certain land in Sullivan County, Indiana.⁷⁸ The grantor retained title to all other seams of coal in and under the above described lands, together with the right to mine and remove them. Comet Coal and Clay Company, Inc., (Comet) and the other defendants eventually acquired title to the other veins of coal.

Later, it was determined that there were seven veins of coal underlying the land involved in the 1919 conveyance so that the sixth vein and the surface vein were not the same. Lippeatt filed suit claiming the deed conveyed the surface vein, and Comet argued the deed conveyed only the sixth vein; however, all parties agreed that only one vein of the coal was conveyed in the deed.⁷⁹ Both parties moved for summary judgment, and the trial court granted summary judgment in favor of Comet holding that the deed conveyed only the sixth vein as a matter of law.⁸⁰

Lippeatt appealed arguing that the deed was ambiguous, and that the trial court should have considered extrinsic evidence. In reaching its decision, the trial court concluded that the words "sixth (6th) vein" were more specific than the words "surface vein," and that if any ambiguity existed, it must be resolved in favor of Comet because the habendum clause only referred to the sixth vein. In affirming the judgment of the trial court, the court of appeals looked to the rules of construction applied by the trial court.⁸¹ However, it is questionable whether the rules of construction relied upon by the court of appeals were correctly applied.

The court of appeals appears to have agreed with the trial court's determination that the term "sixth vein" is more specific than the term "surface vein" because the surface vein can be composed of coal from the fifth, sixth, seventh, or eighth veins but there is only one

In *Hodel v. Indiana*, 452 U.S. 314 (1981), the State of Indiana, the Indiana Coal Association and others challenged the constitutionality of the "prime farmland" provisions of the Surface Mining and Reclamation Control Act of 1977. *Id.* These provisions require the applicant for a permit to mine on prime farmland which is historically used as cropland, to show that he has the capacity to restore the land to prime farmland within a reasonable period of time after completion of mining operations. *Id.* The Court held that the provision of the Act did not violate the commerce clause because the production of coal for interstate commerce cannot be at the expense of agriculture, the environment, public health or safety. *Id.*

⁷⁶419 N.E.2d 1332 (Ind. Ct. App. 1981).

⁷⁷See, e.g., *Hauck v. Second Nat'l Bank*, 153 Ind. App. 245, 286 N.E.2d 852 (1972).

⁷⁸419 N.E.2d at 1333.

⁷⁹*Id.* at 1334.

⁸⁰*Id.*

⁸¹*Id.* at 1336.

vein that can be the sixth vein.⁸² While it is true that specific words control general words, it is unclear why the court found the term "sixth vein" to be more clear because, for reasons of geographical uncertainty, it is difficult to determine if a vein is the sixth or seventh vein of coal, but the surface vein is always the vein nearest to the surface.⁸³

The court of appeals also approved the trial court's application of the "four corners" rule of construction. The rule states that in interpreting an instrument, parol evidence is inadmissible to expand, vary, or explain the instrument unless there is evidence of fraud, mistake, illegality, duress, undue influence, or ambiguity.⁸⁴ Furthermore, even if an ambiguity is shown, extrinsic evidence is not admissible "until the four corners have been searched to ascertain whether the instrument itself affords a reasonably clear understanding of what the drafters intended."⁸⁵ Assuming that the meaning of the disputed terms could be determined by reference to all parts of the instrument, the trial court looked to the habendum clause in the deed, which can be used to explain, qualify, lessen, or enlarge the estate granted in the premises or granting clause of a deed.⁸⁶ The trial court noted that while the granting clause used the terms "sixth (6th) vein" and "surface vein," the habendum clause of the deed clarified the granting clause by twice referring to the sixth vein of coal without mentioning the surface vein.

The court's reliance upon the habendum clause to clarify the granting clause is questionable. As the court itself points out, that granting clause usually controls the habendum.⁸⁷ In addition, numerous cases hold that if there is an irreconcilable conflict between the granting clause and the habendum, which renders intention doubtful, the granting clause will control.⁸⁸ Thus, the court in *Lippeatt* looked to the habendum clause, without first establishing whether there was an irreconcilable conflict between the terms of the granting clause and the terms of the habendum.

The court also rejected Lippeatt's argument that the surface vein should control because it is a natural monument. The court noted that

⁸²*Id.* at 1335.

⁸³*Id.*

⁸⁴See, e.g., *Hauck v. Second Nat'l Bank*, 153 Ind. App. 245, 260, 286 N.E.2d 852, 861 (1972).

⁸⁵419 N.E.2d at 1335 (emphasis deleted) (quoting *Hauck v. Second Nat'l Bank*, 153 Ind. App. 245, 263, 286 N.E.2d 852, 862 (1972)).

⁸⁶419 N.E.2d at 1334-35. For a discussion of this rule, see *Prior v. Quackenbush*, 29 Ind. 475 (1868).

⁸⁷419 N.E.2d at 1335. See also *Shoe v. Heckley*, 78 Ind. App. 586, 593, 134 N.E. 214, 217 (1922).

⁸⁸See *Pointer v. Lucas*, 131 Ind. App. 10, 169 N.E.2d 196 (1960); *Long v. Horton*, 126 N.E.2d 568 (1956); *Richards v. Richards*, 60 Ind. App. 34, 110 N.E. 103 (1915).

the rule that monuments control over course and distance is a rule used for determining the location and boundaries of land and "is of limited usefulness to determine the extent of the conveyance."⁸⁹ It could be argued that the rule of construction, that where the granting clause is indefinite, the habendum can be used to clarify the granting clause, could have been used to determine the type of estate conveyed and not just the extent of the conveyance.⁹⁰

As exemplified in *Lippeatt*, some of the rules of construction are inconsistent with each other, and the decision in a given case can vary depending upon which rules of construction are chosen.⁹¹ For example, the court in *Lippeatt* chose to ignore a basic rule of construction; that is, the deed should be construed most strongly against the grantor.⁹² While the application of the rules of construction in *Lippeatt* may be less than perfect, it is not clear that the admission of extrinsic evidence to determine the intent of the parties to a 1919 deed would have proven any more satisfactory.

The second decision involving mineral deeds, *Richardson v. Citizens Gas & Coke Utility*,⁹³ presents a similar deed interpretation problem as that encountered in *Lippeatt*. The plaintiffs, Claude and Elma Richardson, brought an action against Citizens Gas & Coke Utility and others, collectively referred to as Citizens, claiming an inverse condemnation as a result of Citizens' improper seizure of the Richardsons' interest in coal and other minerals lying beneath the land of Section 10 in Green County, Indiana, which was conveyed to Claude Richardson by deed in 1933. Citizens argued that the Richardsons' 1933 deed conveyed title only to the coal and hard minerals lying beneath the land, and that it did not convey any interest in oil or gas. Therefore, Citizens claimed the rights to the oil and gas interests as well as the rights to underground storage, by virtue of leases and assignments of leases that were executed by the surface owners of Section 10. In addition, Citizens claimed a way of necessity through the Richardsons' coal strata to reach the oil and gas lying beneath the coal, and Citizens argues that such drilling through the coal strata would not constitute a taking of Richardsons' interest. This argument implies that coal mining and gas removal and/or storage are compatible.⁹⁴

⁸⁹419 N.E.2d at 1336. See also CRIBBET, *supra* note 51, at 169-70.

⁹⁰See CRIBBET, *supra* note 51, at 165 n.34.

⁹¹For a discussion of various rules of construction, see CRIBBET, *supra* note 51, at 169-70.

⁹²See *Davenport v. Gwilliams*, 133 Ind. 142, 31 N.E. 790 (1892); *Shoe v. Heckley*, 78 Ind. App. 586, 134 N.E. 214 (1922).

⁹³422 N.E.2d 704 (Ind. Ct. App. 1981).

⁹⁴It is not clear from the facts whether only native gas, only injected gas, or a mixture of native and injected gas is involved. The facts indicate that Citizens is using the land in connection with its Linton gas storage field, and the Richardsons are

The facts show that the mineral rights in Section 10 were severed from the surface rights by a series of thirteen mineral deeds executed between 1899 and 1905. Ten of the deeds conveyed coal and other minerals, two of the deeds conveyed only coal, and one deed conveyed "coal, clays, minerals and mineral substances."⁹⁵ The three grantees who purchased these rights consisted of two incorporated coal companies, whose articles of incorporation did not authorize the exploration or development of oil or gas properties, and one individual who dealt only in coal properties. Historical documents showed that at the time the severance deeds were executed, oil or gas had not been discovered in Green County.

The rights under these deeds eventually were acquired by the United Fourth Vein Coal Company (United). United subsequently became bankrupt, and its coal and mineral rights in Section 10 were sold to Claude Richardson. The first deed from United conveyed only unmined coal. It was later discovered that United did not own title to the entire tract conveyed and as a compromise, Richardson accepted a second deed conveying all right and title "to coal and minerals lying in and under (Section 10)."⁹⁶ Richardson did not explore for oil and gas until 1943 when he executed a gas and oil lease with Sun Oil Company. Natural gas was discovered by Sun Oil in 1947, but due to lack of interest in natural gas, the well was capped and Richardson was released from the lease.

In 1921, Ferd Bolton purchased oil and gas leases from the grantors and/or their successors in interest of the thirteen original severance deeds. In 1961, Citizens received assignments of these gas and oil leases from the surface owners of Section 10. The assignment granted Citizens not only the right to remove existing gas, but the right to "inject, store and remove gas, whether native or otherwise . . . regardless of the source of such gas."⁹⁷

The Richardsons became aware of Citizens' interest in 1963 when they discovered Citizens drilling exploratory wells on Section 10. The

claiming an inverse condemnation under Indiana Code section 32-11-4-5 (1982) (Title 32, article 11, chapter 4 of the Indiana Code is entitled, "Eminent Domain for Gas Storage"). Thus, it is not clear whether the Richardsons' claim, apart from the claim with regard to the taking of their coal interest, is based on Citizens' taking of native gas to which the Richardsons claim the right to explore under the 1933 deed, or whether the Richardsons, as the owners of the mineral rights, including oil and gas, are claiming an interest in the strata for storage rights once the native gas has been removed, or whether they are claiming both. The decision of the court of appeals resolving the ownership of oil and gas rights against the Richardsons renders these issues moot. 422 N.E.2d at 704.

⁹⁵422 N.E.2d at 707.

⁹⁶*Id.* at 708 (emphasis in original).

⁹⁷*Id.* (emphasis in original).

Richardsons attempted to lease their interests to Citizens, but when negotiations failed, the Richardsons filed suit.

Three issues were presented at the trial, and the trial court ruled on them at three separate hearings. At the first hearing, the trial court found that Citizens owned title to the gas and oil exploration rights and gas storage rights and thus granted a partial summary judgment in Citizens' favor. At a second evidentiary hearing, the court found that coal mining and gas storage are compatible but did not expressly find that Citizens had an easement through the Richardsons' coal strata to reach the gas. At a third hearing, final arguments were held and the court ruled that no compensable taking of the Richardsons' coal interests had occurred, thus impliedly finding an easement through the coal strata.⁹⁸ The Richardsons appealed.

In affirming the judgment of the trial court,⁹⁹ the court of appeals considered the three issues raised at the trial. In discussing the ownership of gas and oil rights, the court of appeals stated that a conveyance of "coal and other minerals" plus "coal, clays, minerals and mineral substances" is interpreted "to include gas and oil unless a contrary intention of an ambiguity is manifested by the language of the instrument as a whole."¹⁰⁰ The case cited as authority by the court, *Monon Coal Co. v. Riggs*,¹⁰¹ does not appear to support this position. In fact, several leading authorities have cited the case for the proposition that, in Indiana, when the term "minerals" is used in a mineral deed, the term "minerals" is found to be ambiguous with regard to whether oil and gas are conveyed, and extrinsic evidence on this issue is freely admitted.¹⁰²

Despite this misleading reference, the court of appeals went on to examine the circumstances surrounding the original conveyances to ascertain the grantors intent because the phrase "coal and other minerals" was ambiguous. The court of appeals also noted that Indiana takes the position that oil and gas are substances ferae naturae and, unlike hard minerals, are subject to the rule of capture.¹⁰³ This characterization of oil and gas adds an element of ambiguity to the deed because title to the oil and gas cannot be conveyed by the owner of the land, and a conveyance of minerals raises the question of whether the grantor intended to also convey the right to explore for

⁹⁸*Id.* at 706-07.

⁹⁹*Id.* at 713.

¹⁰⁰*Id.* at 709 n.4 (citing *Monon Coal Co. v. Riggs*, 115 Ind. App. 236, 56 N.E.2d 672 (1944)).

¹⁰¹115 Ind. App. 236, 56 N.E.2d 672 (1944); *See Annot.*, 37 A.L.R.2d 1435 (1959).

¹⁰²*See R. HEMINGWAY, THE LAW OF OIL AND GAS § 1.1, at 2 n.5 (1971); 1A W. SUMMERS, THE LAW OF OIL AND GAS § 135, at 275-76 n.32 (1954); 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 219.4, at 275 n.1 (1981).*

¹⁰³422 N.E.2d at 711.

oil and gas and thereby allow the grantee to acquire title by reducing it to possession.¹⁰⁴ After examining the circumstances existing at the time of the conveyance to determine the intent of the parties, the court concluded that there was no material issue of fact in dispute and that the trial court had properly granted a partial summary judgment on the issue.¹⁰⁵

The second issue relating to the compatibility of coal mining and gas storage was decided on the evidence and presents no problem. However, had they not been compatible, the Richardsons' interest could have been condemned for underground storage of gas.¹⁰⁶

The third issue discussed by the court of appeals relates to the easement through the coal field to reach the gas strata. The court found that because the original deeds conveyed only the right to the coal, the grantors retained the gas and oil exploration rights and, thus, impliedly reserved an easement through the coal for drilling purposes.¹⁰⁷ In reaching this finding, the court relied upon *Pyramid Coal Corp. v. Pratt*,¹⁰⁸ one of the leading cases on this point. *Pratt* holds that where the owner of land conveys coal beneath his land but retains title to everything beneath the coal, the surface owner has the right of access to the strata beneath the coal, even though the deed does not expressly reserve such a right.¹⁰⁹ The Richardson court found that the easement was 300 feet in diameter, basing this finding on a federal law requiring a 300 foot safety barrier around each well.¹¹⁰

For some unknown reason, the court of appeals concluded that the easement was an easement in gross and criticized the trial court and the parties for using the phrase "way of necessity" to describe the easement.¹¹¹ While not wishing to appear petty, one could argue that the term "easement in gross" may be even less accurate than the term "way of necessity." In the leading case in this area, *Chartiers Block Coal Co. v. Mellon*,¹¹² the term "way of necessity" was rejected by the majority of the court because its use in this context would require a major modification of the common law rules regarding a surface right of way.¹¹³ Nevertheless, the *Mellon* court did find that the owner of the land who retained oil and gas rights had a "right

¹⁰⁴*Id.* (quoting *Monon Coal Co. v. Riggs*, 115 Ind. App. 236, 240, 56 N.E.2d 672, 673 (1944)).

¹⁰⁵422 N.E.2d at 710.

¹⁰⁶See IND. CODE §§ 32-11-4-1 to -5 (1982).

¹⁰⁷422 N.E.2d at 713.

¹⁰⁸229 Ind. 648, 99 N.E.2d 427 (1951).

¹⁰⁹*Id.* at 652-53, 99 N.E.2d at 429.

¹¹⁰422 N.E.2d at 713. See 30 U.S.C. § 877 (1976).

¹¹¹422 N.E.2d at 706 n.2.

¹¹²152 Pa. 286, 25 A. 597 (1893).

¹¹³*Id.* at 298, 25 A. at 599.

of access" to these minerals through a superjacent coal strata which he had previously conveyed.¹¹⁴ Many subsequent decisions have used the term "way of necessity" to describe this right of access.¹¹⁵ The term "easement in gross," however, is misleading when applied to such a right of access because it suggests that the easement is personal and that there is no dominant estate.¹¹⁶ It is important to note that the right of access through the superjacent strata by the owner of the subjacent mineral interests is a right which exists without any express grant or reservation.¹¹⁷ Thus, the subjacent owner's estate is dominant in the sense that he has the right to drill wells as may be reasonably necessary for production even though the wells penetrate superjacent estates.¹¹⁸

Perhaps what led the court of appeals to use the term "easement in gross" is the fact that in *Richardson* the right to drill through the coal strata was connected, in part, with the right to store gas in the strata. As the court stated, "[b]y introducing evidence that the gas storage fields were below the coal, Citizens established the need for utilizing these easements reserved by the original grantors which were conveyed to the subsequent surface owners and leased by Citizens."¹¹⁹ Perhaps the court of appeals was not sure if an implied easement exists to drill through a superjacent strata to inject gas into a subjacent strata. In fact, where there has been a severance of the surface and mineral estates, which includes oil and gas, there is disagreement as to who has the right to use a strata for the storage of gas.¹²⁰ Some courts have held that only the minerals are conveyed by a mineral deed, and that the space, once the minerals have been removed, remains with the surface estate.¹²¹ Other courts have held that the owner of the mineral estate, which includes oil and gas, should be considered as having the right to use the strata for all purposes relating to minerals whether native or injected, absent contrary language in the deed.¹²² Had the court in *Richardson* found that the deed to Richardson conveyed to him the oil and gas interest, an interesting question would have arisen in the condemnation action as to

¹¹⁴*Id.*

¹¹⁵See, e.g., *Pyramid Coal Corp. v. Pratt*, 229 Ind. 648, 99 N.E.2d 427 (1951); see also Annot., 25 A.L.R.2d 1245 (1952).

¹¹⁶"An easement (or profit) in gross when in its creation it is not intended to benefit the owner or possessor of land as such but is intended to exist without a dominant tenement." R. BOYER, SURVEY OF THE LAW OF PROPERTY 561 (3d ed. 1981).

¹¹⁷See *Pyramid Coal Corp. v. Pratt*, 229 Ind. 648, 651-52, 99 N.E.2d 427, 429 (1951).

¹¹⁸See *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 296, 25 A. 597, 598 (1893).

¹¹⁹422 N.E.2d at 713.

¹²⁰See 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 222, at 332-33 (1981).

¹²¹E.g., *Tate v. United Fuel Co.*, 137 W. Va. 272, 71 S.E.2d 65 (1952).

¹²²E.g., *Central Ky. Natural Gas Co. v. Smallwood*, 252 S.W.2d 866 (Ky. 1952).

the Richardsons' claim for compensation with regard to the injected gas and storage rights.

F. Real Estate Transactions

1. *Real Estate Broker.*—There were three cases decided during this survey period dealing with real estate brokers and listing agreements.¹²³ The first case involves the interpretation of an extension clause in a listing agreement. In *Barrick Realty Co. v. Bogan*,¹²⁴ Nick Adams, an agent for Barrick Realty Company (Barrick) was contacted by Herbert Gehring regarding commercial real estate in Valparaiso, Indiana. Gehring expressed interest in purchasing the Lembke Hotel. Adams contacted Charles Bogan, who represented the hotel owners. Bogan signed an exclusive listing agreement on the hotel with Adams and Barrick for a two-day period. The asking price for the property was \$275,000 and provided for the payment of a ten percent commission of the gross sale price. The listing agreement contained an extension clause which provided that if the hotel were sold within six months after the expiration of the agreement to any person with whom negotiations had taken place during the exclusive listing period, the commission would still be paid to the realtor.

After touring the hotel, Gehring did not accept Bogan's offer nor did he make any counter offers. However, within six months, Gehring, Gehring's partner, and Gehring's brother purchased the hotel for \$220,000. Adams and Barrick filed suit for their commission and appealed from a negative judgment. The court of appeals found that the word "negotiations" suggested something more than "discussions" but less than a sale, and that there was evidence to support the trial court's findings that negotiations had not taken place.¹²⁵ The appellate court suggested that if the parties had intended a commission to be payable upon the sale during the extension period to any buyer to whom the property was shown and with whom "discussions" had ensued, the agreement should have provided for this contingency.¹²⁶ In a situation where there is only one prospective buyer, as in this case, the court suggested that the parties' agreement might provide specifically for a commission if the property is sold to the named individual within the period of the extension agreement.¹²⁷

The other two cases in this area illustrate a problem which arises

¹²³See also *Plymale v. Upright*, 419 N.E.2d 756 (Ind. Ct. App. 1981) (representations by the broker regarding the sale are an opinion and do not give legal effect to an offer to purchase).

¹²⁴422 N.E.2d 1306 (Ind. Ct. App. 1981).

¹²⁵*Id.* at 1308-09.

¹²⁶*Id.* at 1308.

¹²⁷*Id.* at 1308 n.1.

in brokerage agreements. This problem concerns the interpretation of when a broker has found a buyer "ready, willing and able" to purchase the property on the terms listed in the brokerage agreement. In *Wilson v. Upchurch*,¹²⁸ Upchurch, a veterinarian, was interested in selling his veterinary hospital, its equipment and a two-bedroom apartment located on 1.11 acres of land. The property was listed with Marion and Joanne Loser. The asking price was \$290,000 with a \$40,000 down payment, and the balance to be paid over twenty years at a ten percent interest rate. The Losers found a potential buyer, James Wilson, who made a counter offer to purchase for \$280,000. The Upchurches eventually signed a purchase agreement with Wilson, but the sale was never completed because the parties could not agree on the terms of two contracts that were conditions for the sale. In a suit for specific performance the trial court found for Upchurch, and the Losers appealed for their sales commission.

Both the trial court and court of appeals found that the agreement was not meant to be binding on the parties because there were at least two conditions precedent contained in the agreement: the drafting of a mutually agreed upon sales contract and an employment contract whereby Upchurch would work for Wilson at the hospital.¹²⁹ The court of appeals noted that

Before a broker is entitled to his commission he must prove
1) an actual sale of the real estate or 2) that he had secured
a buyer who was ready, willing and able to purchase the prop-
erty upon the terms listed by the seller and the seller refus-
ed to complete the transaction, or 3) that by and through the
procurement of the broker, a third party had entered into a
valid executory contract with the seller.¹³⁰

Here the parties had not entered into a binding contract because the purchase agreement was not binding on the parties, the counter offer by Wilson was not upon the terms listed by the sellers, and there was no contract entered into by a third party. Thus, the Losers had not fulfilled one of the prerequisites for earning their commission.

As with *Upchurch*, *Blue Valley Turf Farms v. Realestate Marketing & Development, Inc.*,¹³¹ adds a gloss to the interpretation of ready, willing and able as it applies to listing agreements. In July 1974, Blue Valley Turf Farms, Inc. (Blue Valley) listed certain equipment and real estate with Realestate Marketing and Development, Inc. (Realestate). On September 2, 1974, Blue Valley entered into an agreement of pur-

¹²⁸425 N.E.2d 236 (Ind. Ct. App. 1981).

¹²⁹*Id.* at 239.

¹³⁰*Id.* at 238.

¹³¹424 N.E.2d 1088 (Ind. Ct. App. 1981).

chase with a buyer, John Hilger, and agreed to pay Realestate a commission of \$9,000. The agreement was conditional upon Hilger obtaining a new mortgage loan with thirty days. On December 10, 1974, Blue Valley notified Hilger that the agreement was terminated because Hilger had not obtained the mortgage. Hilger brought suit against Blue Valley for specific performance and this suit was settled. Realestate then filed suit against Blue Valley to recover its commission. The trial court found that Hilger was ready, willing, and able to purchase the property, and that Blue Valley had failed to perform pursuant to the agreement. The court of appeals affirmed.¹³²

On appeal, Blue Valley argued that the contract was unenforceable against Hilger because Hilger had only obtained an oral commitment from a lender to loan the funds in exchange for a mortgage securing the loan. In answering this argument, the court of appeals noted that only parties and privies have the right to plead the statute of frauds as a defense.¹³³ While the lender might have been able to raise this defense in a suit instituted by Hilger, Blue Valley could not raise it for them. The court alluded to, but did not answer, the question whether an agreement to lend money in exchange for a mortgage interest comes within the statute of frauds. However, this point was not relevant to the case at bar, because the suit was based on the agreement between Blue Valley and Realestate and not the contract between Hilger and his lender.

2. *Vendor and Purchaser.*—In *Lewandowski v. Beverly*,¹³⁴ the buyers of certain real property, the Lewandowskis, brought an action for specific performance and damages against the sellers, the Beverlys, for failure to perform a contract for sale. The facts show that the buyers agreed to purchase for \$7,900 a one-acre tract of land located at the southeast corner of a twenty-two acre tract of land owned by the sellers. The sellers were to furnish a stake survey and evidence of title in the form of an owner's guarantee policy in the amount of the purchase price. The buyers paid \$500 down as earnest money. On the date set for closing, the buyers went to the sellers' home with a check for the balance of the purchase price, and certain problems became evident. The sellers had failed to provide evidence of good title because they mistakenly had believed this provision had been stricken from the contract. Other evidence indicated that there was a \$66,000 mortgage on the twenty-two acre tract, that the sellers had not obtained a release of the mortgage on the land to be sold, and that there were certain unpaid taxes. What subsequent negotiations ensued are unclear; each party claimed the other failed to cooperate.

¹³²*Id.* at 1090.

¹³³*Id.*

¹³⁴420 N.E.2d 1278 (Ind. Ct. App. 1981).

Eventually, the sellers returned the buyers' earnest money deposit and the buyers commenced suit. The trial court found for the sellers and the buyers appealed.

In reversing the decision of the trial court, the court of appeals held that the buyers had remained ready, willing, and able to perform all obligations under the contract and that the trial court's decision was "against the logic and effect of the facts."¹³⁵ Although the sellers contended that any problems surrounding the release of the mortgage and payment of the taxes would have been resolved at the closing, the court noted that the evidence of good title was to be obtained five days prior to closing.¹³⁶ The fact that the property had increased in value to between \$15,500 and \$16,000 was not grounds for denying relief because the delay was the fault of the sellers.

The sellers argued that material alterations made the contract unenforceable. This argument was based upon the agreement between the parties to move the boundary line of the property to account for an encroachment upon the land, which was discovered in the stake survey.¹³⁷ In rejecting this argument, the court quoted from an earlier decision that held that where modifications or alterations are required to be in writing and oral alterations or modifications are made, the original contract, unless it is entirely abandoned, still exists and binds the parties.¹³⁸ In conclusion, the court held that "[t]he contract, as altered, is valid and binding on both parties."¹³⁹

If the modification of the contract was in writing, there is nothing unusual about the court's decision in *Lewandowski*. One suspects, however, that the modification was oral and thus the court's decision is not in accord with the general rule of law that oral modifications to a contract for the sale of real property are not enforceable.¹⁴⁰ It is true that the original contract may still be enforced,¹⁴¹ but the decision in *Lewandowski* seems to suggest that the contract as modified is binding on the parties. Had the court not enforced the contract as modified, however, a serious problem would have been presented to the trial court because there is no evidence that the sellers could clear title to the four-foot strip on which the neighbors' fence encroaches.

¹³⁵*Id.* at 1281.

¹³⁶*Id.* at 1279-80.

¹³⁷*Id.*

¹³⁸*Id.* at 1282 (quoting *Foltz v. Evans*, 113 Ind. App. 596, 612, 49 N.E.2d 358, 365 (1943)).

¹³⁹420 N.E.2d at 1282 (emphasis added).

¹⁴⁰See 4 S. WILLISTON, A TREATISE OF THE LAW ON CONTRACTS § 593 (3d ed. 1961). See also *Ward v. Potts*, 228 Ind. 228, 91 N.E.2d 643 (1950); *Bradley v. Harter*, 156 Ind. 499, 60 N.E. 139 (1901).

¹⁴¹See CRIBBET, *supra* note 51, at 132. See also *Imperator Realty Co. v. Tull*, 228 N.Y. 447, 127 N.E. 263 (1920).

This problem is solved in *Lewandowski* by enforcing the contract as altered.

The case of *Workman v. Douglas*,¹⁴² one of the more interesting cases decided during this survey period, is significant because the court analyzes the doctrines of resulting trust and part performance. Steven and Betty Douglas, a young married couple who were unable to finance the purchase of a home, sought aid from a friend, Buford Workman. Under an alleged oral agreement, Workman purchased a house in his own name for \$15,000. He paid \$3,000 as a down payment and obtained a \$12,000 mortgage for twenty-five years at eight and one-half percent interest with monthly payments of \$96.80. Workman then allowed Steven and Betty to move into the house and to pay him \$96.80 a month. The controversy in this case involves the classification to be given the arrangement between Workman and the Douglasses. According to Workman, the couple was merely renting the home; according to the Douglasses, they were buying the house from Workman for \$96.80 a month for a term of twenty-five years. Steven and Betty were divorced in 1979, and by divorce decree Betty received the property in contention. At that time, the payments were in arrears approximately \$1,152, and Workman filed suit for the rent, damages, and possession. Betty counterclaimed on a resulting trust theory, alleging that an oral contract existed to purchase the property.

The trial court found that there was an oral contract to purchase, and that a formal contract for sale should be prepared using the Indianapolis Bar Association or Allen County Bar Association Land Contract. The contract was to supply such terms as who was responsible to pay taxes and to provide insurance, what amount was due monthly, and what interest rate was applicable to the monthly installment. The judgment also provided that if Betty paid Workman the sum of \$1,529.35 on or before May 2, 1980, and the sum of \$96.80 on May 5, 1980, she would be entitled to remain in possession; otherwise, Workman would be entitled to a judgment for such sums and would have the right to immediate possession. Workman appealed.

The court of appeals examined the resulting trust theory upon which the trial court had based its decision and concluded that the judgment could not be affirmed on this theory.¹⁴³ The purchase money resulting trust, as it was known at common law, was abolished by statute in Indiana except in three distinct situations:

Where the alienee shall have taken an absolute title in his own name without the consent of the person with whose money the consideration was paid; or where such alienee, in

¹⁴²419 N.E.2d 1340 (Ind. Ct. App. 1981).

¹⁴³*Id.* at 1345.

violation of some trust, shall have purchased the land with moneys not his own; or where it shall be made to appear that, by agreement . . . the party to whom the conveyance was made . . . was to hold the land or some interest therein *in trust for the party paying the purchase-money or some part thereof.*¹⁴⁴

The court noted that in all of these situations the purchase money or some part thereof must be furnished by the person claiming a resulting trust. Since all the purchase money in the instant case was furnished by Workman, the agreement could not have created a resulting trust.¹⁴⁵

The court of appeals next addressed the issue of part performance. Although the judgment could not be sustained on the theory of a resulting trust, possession under the oral contract and part payment of the purchase price by the Douglasses appeared to be sufficient acts under the doctrine of part performance to remove an oral contract from the statute of frauds.¹⁴⁶ Thus, if the case were remanded, the trial court might have reached the same conclusion based on the doctrine of part performance. However, the court of appeals went on to find that the oral agreement was not sufficiently definite to be enforceable.¹⁴⁷ There had been no agreement as to who should pay the taxes and insurance during the twenty-five year period, whether the \$3,000 down payment was to be repaid to Workman, what the rights of the parties were in the event of default, who would make repairs, and finally what rate of interest would be paid. The court concluded that these elements are essential in a time-payment contract.¹⁴⁸ In essence, the anomalous proposition advanced by the Douglasses was that Workman, as a reward for helping out the young couple, would lose the \$3,000 down payment and be forced to pay the costs of taxes, insurance, and repairs for twenty-five years.¹⁴⁹

The court of appeals criticized the trial court for attempting to write a contract for the parties—in other words “to do for the parties what they should have done in the first place.”¹⁵⁰ Courts can only enforce contracts made between the parties, not create new ones, and in this case the court of appeals found that the oral agreement was

¹⁴⁴*Id.* at 1344 (citing IND. CODE § 30-1-9-8 (1982)) (emphasis in original).

¹⁴⁵419 N.E.2d at 1344-45.

¹⁴⁶See *Bastian v. Crawford*, 180 Ind. 697, 103 N.E. 792 (1914); *McMahan Constr. Co. v. Wegehoft Bros., Inc.*, 170 Ind. App. 558, 354 N.E.2d 278 (1976). For a general discussion of the doctrine of part performance, see 3 AMERICAN LAW OF PROPERTY §§ 11.7-12 (A. Casner ed. 1952).

¹⁴⁷419 N.E.2d at 1345.

¹⁴⁸*Id.* at 1346.

¹⁴⁹*Id.*

¹⁵⁰*Id.*

too indefinite to be enforced. While the doctrine of part performance can remove an oral contract from the statute of frauds, a valid oral contract is a prerequisite.

G. *Slander of Title*

In *Curry v. Orwig*,¹⁵¹ the court examines the issue of what constitutes a sufficient "interest" to justify filing lis pendens notice and to not cause a slander of title. In 1959, Heritage Woods subdivision was developed by Roger and Carol Curry and the Bryan Corporation. The area was to be exclusively residential, and all residents were required to enter into a restrictive agreement with the developers that was to insure the community's character and to enhance property values. The restrictive agreement document, which contains a legal description of the subdivision, was never recorded. The road, Heritage Woods Road was mentioned in the agreement, and the Currys and the Bryan Corporation retained legal title to the road and granted the residents an easement for ingress and egress. The deeds granting the easements were recorded with specific legal descriptions. When William and Jane Orwig purchased their lot in Heritage Woods in 1963, Heritage Woods Road ended in a cul-de-sac, and the Orwigs understood this was to be the permanent end of the road. The Currys, however, maintained that they had always made clear their intent to use the land to the east of the subdivision, if it became available. In 1968, the Currys and the Bryan Corporation acquired the land to the east of Heritage Woods and drew up plans for a subdivision to be known as Heritage Woods East. The Currys envisioned extending Heritage Woods Road into this area. They denied that there was any plan to develop the area to the south of Heritage Woods known as the Curry-Bryan farm. Despite these assurances, the Orwigs and other residents became concerned that an expansion to the south might also occur. In December 1968, the Orwigs filed a declaratory action to determine their rights in the easement to Heritage Woods Road and also filed a lis pendens notice, which indicated that a suit had been filed. In the lis pendens notice, the legal description of the real estate involved described some 299.5 acres to the east and south of the subdivisions owned by the Currys and the Bryan Corporation.

When the Currys attempted to sell part of the land to the south which was included in the lis pendens notice, they failed because the purchasers were unable to obtain financing or title insurance. The Currys then filed this suit for slander of title. The trial court entered judgment for the Orwigs, finding that they had legal justification for filing the notice because of the controversy surrounding the interpre-

¹⁵¹429 N.E.2d 268 (Ind. Ct. App. 1981).

tion of the easement and the impact of the proposed extension on the neighborhood.¹⁵² The Currys appealed.

The court of appeals noted that the elements of slander of title are: the statements made regarding title must have been false; they must have been made maliciously; and they must have caused the plaintiff pecuniary loss.¹⁵³

To understand the basis of the Currys' claim, it is necessary to examine the lis pendens notice statute.¹⁵⁴ Essentially, the statute provides that if a person commences a suit in a state court or a federal district court sitting in Indiana, either by complaint or cross-complaint, to enforce any lien upon, right to, or interest in any real estate, and that suit is not founded on an instrument signed by the party having title of record, and either properly recorded or a judgment recorded in the county where the land is located, then the person may file a lis pendens notice. If such a notice is not filed, then the bringing of the suit will not act as constructive notice of the interest as against bona fide purchasers or encumbrancers of the property.¹⁵⁵

The Currys advanced several arguments involving the interest necessary before lis pendens notice may be filed. The first argument was that the interest referred to in the statute refers to an interest affecting title and that an easement is not the type of interest intended to be filed in the lis pendens notice. The easement involves land referred to in the instruments creating the easement, in the easement deed, in the deed conveying the Orwigs' property in Heritage Woods, and in the unrecorded agreement between the residents and developers. The Currys argued that because the purpose of the lis pendens statute was to give notice of unrecorded interests, the Orwigs' filing of notice was improper because the easement deed, the only source of the Orwigs' rights, was already properly recorded.¹⁵⁶ If there were no interest entitled to be recorded, the Currys argued that the statements regarding title were false, and thus the Currys hoped to establish one of the elements of slander of title.¹⁵⁷

Secondly, the Currys argued that the Orwigs' lack of an interest in the property described in the lis pendens notice overcame any claim of privilege. Apparently, the Orwigs were claiming that the filing of the notice was privileged. This argument is premised on the rule that ordinarily actionable statements are absolutely privileged when made in the course of judicial proceedings, and that this rule should be ex-

¹⁵²*Id.* at 270.

¹⁵³*Id.* at 270 n.1.

¹⁵⁴IND. CODE § 34-1-4-2 (1982).

¹⁵⁵IND. CODE § 34-1-4-8 (1982).

¹⁵⁶429 N.E.2d at 271-72.

¹⁵⁷*Id.*

tended to the filing of notice in the lis pendens records. In *Albertson v. Raboff*,¹⁵⁸ a California case cited by both parties, Judge Traynor extended such a privilege to lis pendens notices on the theory that the notices are simply republications of the pleadings. The Currys argued that a suit involving title to an easement does not affect title to the land described in the lis pendens notice and thus it is more than a mere republication of the complaint.¹⁵⁹ The Currys used similar reasoning to conclude that the Orwigs made the statements with malice, another element of slander of title.

The court of appeals observed that the focal point in the case was the question of what constitutes an "interest" in real estate as enunciated in the lis pendens statute.¹⁶⁰ The court noted that there were no cases defining the term under the statute. The court then turned to several secondary authorities and concluded that the statute was designed to protect in rem claims which were not recorded or perfected.¹⁶¹ The court then examined the Orwigs' claim and concluded that it involved more than just personal rights.¹⁶² The court also noted that while the easement deed was recorded, it was not recorded in the chain of title of the purchasers in the new addition. Thus, the only way the Orwigs could put third parties on notice of their rights was by filing the lis pendens notice.

What is unique about the interest asserted by the Orwigs is that it is not a claim to an affirmative right in the described land, but rather a claim to limit the use of the land with regard to the easement. As the court observed: "Given the terrain surrounding the new addition, they might arguably proceed on the theory of an easement by implication or necessity."¹⁶³

Finally, throughout the Currys' argument is the suggestion that somehow the amount of land described in the lis pendens notice, 299.5 acres more or less, showed bad faith or malice on the part of the Orwigs. The trial court found that no precise legal description of Heritage Woods East was even filed and the original plat contained a description different from a subsequent plat. The court of appeals believed there was evidence to support the trial court's finding that the Orwigs were justified in including a description of the land to the south of the subdivision in the lis pendens notice.¹⁶⁴

¹⁵⁸46 Cal. 2d 375, 295 P.2d 405 (1956).

¹⁵⁹429 N.E.2d at 272.

¹⁶⁰*Id.*

¹⁶¹*Id.* at 272-73.

¹⁶²*Id.* at 273.

¹⁶³*Id.*

¹⁶⁴*Id.* at 273-74.

XIV. Secured Transactions and Creditors' Rights

R. BRUCE TOWNSEND*

That the economy is in hard times was demonstrated during the last year by over forty-five decisions concerned with secured transactions and creditors' rights, fifteen cases involving enforcement of support and property division orders, and at least twelve published local opinions in bankruptcy. Without detracting from the importance of this body of case law, it is fair to say that only a few cases have demonstrated outstanding legal craftsmanship. Excellent decisions include opinions clarifying the means by which unrecorded interests in real estate may be perfected;¹ recognizing the commercial obligations of indorsees to perfect security interests when provided by the terms of the indorsement;² giving sensible meaning to mortgage provisions regarding the acceleration and the application of proceeds when loss of the collateral gives rise to insurance funds;³ allowing the assessment of punitive damages against lenders who short-credit paying mortgagors by overcharging on interest⁴ or by refusing to release liens;⁵ recognizing that owners of property interests do not fall within the class of creditors who must file claims with the debtor's estate;⁶ and including in the duty to pay "reasonable" attorney fees those fees incurred in defending an appeal.⁷ The Indiana Court of Appeals deserves no commendation for opinions allowing bankers to cheat by misrepresenting the effect of the one-side forms;⁸ allowing creditors to "terrorize" the family members of debtors;⁹ applying rigidly the rules of proof to determine the existence of a resulting trust in an

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¹Curry v. Orwig, 429 N.E.2d 268 (Ind. Ct. App. 1981). See *infra* text accompanying note 21.

²White Truck Sales v. Shelby Nat'l Bank, 420 N.E.2d 1266 (Ind. Ct. App. 1981). See *infra* text accompanying note 32.

³Hoosier Plastics v. Westfield Sav. & Loan Ass'n, 433 N.E.2d 24 (Ind. Ct. App. 1982). See *infra* text accompanying note 52.

⁴Shelby Fed. Sav. & Loan Ass'n v. Doss, 431 N.E.2d 493 (Ind. Ct. App. 1982). See *infra* text accompanying note 56.

⁵Southwest Forest Indus. v. Firth, 435 N.E.2d 295 (Ind. Ct. App. 1982). See *infra* note 58.

⁶Williams v. Williams, 427 N.E.2d 727 (Ind. Ct. App. 1981), *reh'g granted*, 432 N.E.2d 417 (Ind. Ct. App. 1982). See *infra* text accompanying note 153.

⁷Templeton v. Sam Klain & Son, Inc., 425 N.E.2d 89 (Ind. 1981). See *infra* text accompanying notes 96 & 187.

⁸American Fletcher Nat'l Bank v. Pavilion, Inc., 434 N.E.2d 896 (Ind. Ct. App. 1982). See *infra* text accompanying note 178.

⁹Elza v. Liberty Loan Corp., 422 N.E.2d 760 (Ind. Ct. App. 1981), *transfer denied*, 426 N.E.2d 1302 (Ind. 1981). See *infra* text accompanying note 194.

area where the rules of proof have always been applied generously to allow the establishment of an equitable mortgage;¹⁰ failing to deal adequately with the problem of "due on sale" clauses and with the effects of acceleration under such clauses;¹¹ resurrecting pleading rules in foreclosure matters¹² and proceedings supplemental,¹³ which belong in the last century, and putting exemptions out of the reach of debtors by a similar judicial technique;¹⁴ and giving mechanic's lien laws¹⁵ and statutes barring claims against decedents' estates¹⁶ interpretations which would shock most persons of common sense. Lawyers concerned with bankruptcy matters and with the enforcement of divorce decrees are advised to review the many current decisions which both clarify and obfuscate the law in these areas of practice.¹⁷

A. Secured Transactions

1. *Real Estate Transactions.*—a. *Formalities.*—Suppose that a contract, note, deed, or mortgage purports to bind three co-owners, but only two sign the instrument. Is the instrument binding upon those who signed it? The answer seems to be yes, but parol evidence is admissible to show that those who signed did so upon the condition that the third party also would sign. If the instrument on its face shows that all are to sign, none presumptively are bound until all sign, according to *Ellis v. George Ryan Co.*,¹⁸ where a covenant purporting to bind "all parties hereto" was not signed by all the parties to the

¹⁰Workman v. Douglas, 419 N.E.2d 1340 (Ind. Ct. App. 1981). See *infra* text accompanying note 23.

¹¹Downing v. Dial, 426 N.E.2d 416 (Ind. Ct. App. 1981). See *infra* text accompanying note 43. Cf. Colonial Discount Corp. v. Bowman, 425 N.E.2d 266 (Ind. Ct. App. 1981) (vendor under a conditional sales contract repossessed the property after refusing to consent to a transfer by the vendee).

¹²Colonial Discount Corp. v. Bowman, 425 N.E.2d 266 (Ind. Ct. App. 1981). See *infra* text accompanying note 64.

¹³American Underwriters, Inc. v. Curtis, 427 N.E.2d 438 (Ind. 1981) (requiring defenses of garnishee in proceedings supplemental to be affirmatively pleaded). See *infra* text accompanying note 113.

¹⁴Schuler v. Langdon, 433 N.E.2d 841 (Ind. Ct. App. 1982). See *infra* text accompanying note 102.

¹⁵Bayes v. Isenberg, 429 N.E.2d 654 (Ind. Ct. App. 1981) (notice to both entireties owners required). See *infra* text accompanying note 79; Cato v. David Excavating Co., 435 N.E.2d 597 (Ind. Ct. App. 1982). See *infra* text accompanying note 87.

¹⁶Pasley v. American Underwriters, Inc., 433 N.E.2d 838 (Ind. Ct. App. 1982). See *infra* text accompanying note 147.

¹⁷Recent bankruptcy decisions are discussed in the text, see *infra* notes 161-77 and accompanying text; current decisions relating to enforcement of property division and support orders are considered in the text, see *infra* notes 118-41 and accompanying text.

¹⁸424 N.E.2d 125 (Ind. Ct. App. 1981) (conduct of parties buttressed intent that all parties were to sign).

transaction. The covenant restricting the use of property was held ineffective.¹⁹

b. *Perfection of unrecordable or unrecorded interests in land.*—It is not uncommon for an owner to acquire an interest in land, which arises from an unrecordable transaction. How can the owner perfect that interest? The answer is simple and clear. The purported owner may file an in rem action to establish his title and file lis pendens notice.²⁰ Thereafter, a purchaser is put on constructive notice of the claim which will ultimately be established by a judgment. This point was graphically made in *Curry v. Orwig*,²¹ in which property owners with an easement filed a declaratory judgment suit to establish the ending point of a roadway which ran through their property and filed lis pendens notice of their claim. When the owners of the fee were unable to sell land through which the roadway was projected, suit was brought against the property owners who had filed lis pendens notice for slander of title. The court held that the easement owners, alleging a violation of their easement rights, were privileged in filing the suit based upon probable cause; therefore, no slander of title action was proper.²² The court did not decide the merits of the action upon which the declaratory judgment was based.

c. *Outright deed as a mortgage.*—In need of a home, husband and wife persuaded a friend to purchase a home. The friend made a \$3,000 cash down payment on the home and secured a mortgage for \$12,000. Husband and wife moved in and made payments to the friend in the amount of the monthly mortgage payments. Parol evidence was admitted to prove that the husband and wife were to pay the friend the price. Under these circumstances, the court in *Workman v. Douglas*²³ held that no resulting trust in favor of the husband and wife was established and no contract to sell to the husband and wife was proven.²⁴ The case was decided by applying the traditional rules of

¹⁹*Id.* at 127. Cf. *Parrish v. Terre Haute Sav. Bank*, 431 N.E.2d 132 (Ind. Ct. App. 1982) (signatories to a note, also naming the principal and two sureties on a note who did not sign, were bound in absence of parol evidence of a condition showing that they were not to be bound unless all signed); *Curtis v. Hannah*, 414 N.E.2d 962 (Ind. Ct. App. 1981) (summary judgment in favor of two vendors denied simply because the third named vendor did not execute the contract).

²⁰IND. CODE § 34-1-4-2 (1982). The Indiana Rules of Trial Procedure also allow unperfected interests in personal property to be perfected by a lis pendens suit and filing under the Uniform Commercial Code filing system. IND. R. TR. P. 63.1(C).

²¹429 N.E.2d 268 (Ind. Ct. App. 1981). For further discussion of this case see Krieger, *Property*, 1982 Survey of Recent Developments in Indiana Law, 16 IND. L. REV. 283, 312 (1983).

²²429 N.E.2d at 274. The suit was not based upon a theory of malicious civil prosecution since the lis pendens suit was still pending—for over twelve years.

²³419 N.E.2d 1340 (Ind. Ct. App. 1981). For further discussion of this case see Krieger, *supra* note 21, at 310.

²⁴419 N.E.2d at 1345-46.

resulting trust law which require that the cestui que trust furnish the consideration at the time of the conveyance, and by applying the specific performance doctrine that equity will not enforce contracts where the terms are indefinite. The decision in *Workman v. Douglas* is flawed inasmuch as parol evidence of the sort offered in this case has long been admissible to prove that a conveyance to a grantee who furnished the consideration was in fact a loan with an ensuing equitable mortgage.²⁵

d. *Lease: option to purchase real estate.*—Strict compliance with the acceptance terms of a lease option agreement was excused in *Rowland v. Amoco Oil Co.*²⁶ The general rule is that the terms of an option agreement must be strictly followed if the exercise of an option is to be effective.²⁷ In *Rowland*, the lessee-buyer's promised acceptance was deficient by \$6,000; however, prompt tender of the correct amount was held sufficient, even though it was made apparently after expiration of the time for acceptance.²⁸ The decision in *Rowland* stands for the equitable proposition that strict compliance will not be required if the optionee made an honest mistake in tender.²⁹

2. *Security Interests in Personal Property.*—a. *Perfection.*—The secured party took a security interest in the inventory and accounts of the debtor, Lintz West Side Lumber, Inc. However, the financing statement named as debtors "Lintz, John Richard" and "Lintz, Mayella." In *In re Lintz West Side Lumber, Inc.*,³⁰ the Court of Appeals for the Seventh Circuit held that because the financing statement did not include the name of the debtor corporation, the financing statement was insufficient notice of the security interest to the debtor corporation's creditors, and therefore was invalid against the debtor's trustee in bankruptcy.³¹ A thoughtful argument that the Lintzs and their corporation were considered one and the same in the local community fell on deaf ears.

A truck dealer who accepted and endorsed a check issued by the bank for the purchase of a truck was held liable because the dealer

²⁵See *Moore v. Linville*, 170 Ind. App. 429, 352 N.E.2d 846 (1976). See generally G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW 38-39 (1979).

²⁶432 N.E.2d 414 (Ind. Ct. App. 1982).

²⁷*Id.* at 416.

²⁸*Id.* at 417.

²⁹Accord *Thomas v. Heddon*, 186 Ind. 48, 114 N.E. 218 (1916) (failure of lessees to exercise their option to purchase within specified period of time did not prevent lessees from obtaining specific performance where administrator of lessor's estate refused tender of purchase price, where ability of residuary devisee to pass good title was in question, and where lessees brought suit for specific performance within five days of expiration of the option).

³⁰655 F.2d 786 (7th Cir. 1981).

³¹*Id.* at 791.

failed to comply with the statement on the back of the check that required the payee to perfect a lien on the certificate of title to the vehicle in favor of the bank. In *White Truck Sales v. Shelby National Bank*,³² the court held that an enforceable contract was created between the bank and truck dealer when the dealer endorsed and negotiated the check.³³ Thus, when the purchaser later disposed of the collateral to a bona fide purchaser, who procured a clear certificate of title, the truck dealer was held liable for the loan extended by the bank. The case is most important insofar as the court intimated that the truck dealer may not only be liable for the original loan made to the purchaser by the bank, but also for further advances under a refinancing agreement later made between the bank and the purchaser.³⁴ However, in this case the bank only claimed damages for less than the amount of the first loan.³⁵

b. *Motor vehicle.*—A security interest in personal property, including motor vehicles, must be in a writing that is signed by the debtor, describes the collateral,³⁶ and contains words of promise or grant.³⁷ An exception arises when the secured party is in possession of the collateral.³⁸ Suppose a lender takes possession of the borrower's certificate of title to his motor vehicle without a written security agreement. Does this meet the requirement of "possession of the collateral?"³⁹ The answer seems to be "yes" in view of *Och v. State*,⁴⁰ in which a bail bondsman took possession of the debtor's certificate of title. The bondsman was charged for issuing a bond without collecting the full premium.⁴¹ On the supposition that the title was taken to secure the premium and was a "thing of value," the court reversed the conviction of the bondsman. The court noted that because the space for liens could be filled in and submitted for perfection to the Bureau of Motor Vehicles, a valuable interest, apparently a security interest, was conferred on the possessor of the certificate.

3. *Transfers by Lien Debtor—Effect of Required Consent of Lienholder to Avoid Acceleration.*—Several recent decisions involved security devices providing for acceleration of installment indebtedness

³²420 N.E.2d 1266 (Ind. Ct. App. 1981).

³³*Id.* at 1269.

³⁴*Id.*

³⁵*Id.* at 1268.

³⁶IND. CODE § 26-1-9-203(1)(b) (1982).

³⁷See *Shelton v. Erwin*, 472 F.2d 1118 (8th Cir. 1973); *Mitchell v. Shepherd Mall State Bank*, 458 F.2d 700 (10th Cir. 1972).

³⁸IND. CODE § 26-1-9-203(1)(a) (1982).

³⁹For a case holding that notation of a lien on the certificate of title does not meet Code requirements, see *White v. Household Fin. Corp.*, 158 Ind. App. 394, 302 N.E.2d 828 (1973).

⁴⁰431 N.E.2d 127 (Ind. Ct. App. 1982).

⁴¹*Id.* at 128. See IND. CODE § 35-4-5-40 (1982).

upon transfers by the debtor without the consent of the lienholder. The established rule that the lienholder's consent does not release the original debtor who remains liable as a surety⁴² was reaffirmed in *Downing v. Dial*.⁴³ In *Downing*, the seller of a restaurant business who retained a security interest on the equipment in order to secure the selling price consented to a sale by the original debtor. Later the second purchaser sold to a third purchaser who also assumed the indebtedness. Upon default, the first debtor was held liable on the theory that the second consent was not intended as a novation.⁴⁴

The court in *Downing* did not consider the possibility that the original debtor was released by a binding alteration of the contract because the secured party has insisted upon a substantial prepayment as a condition to his consent to a second transfer. This, in effect, may have amounted to an agreement that altered performance and squeezed transferees into a cash-flow problem by threatening acceleration, thus discharging the debtor-surety.⁴⁵ This point, however, was not discussed. Alternatively, suppose the secured party had required the second assignee to pay an increased interest rate. Under these circumstances, the debtor-surety surely would have been released.⁴⁶ Thus, it is difficult to distinguish a situation where the secured party asked for and obtained a prepayment of interest as was done in *Downing*. Lienholders are well advised to obtain the permission of primary parties when their consent to a transfer results in an alteration of the underlying agreement. Without that permission, the position of the original debtor as a surety more than likely becomes impaired.

A unique consequence of the so-called "due on sale" clauses commonly included in mortgages, conditional sales contracts, and security agreements was also considered in *Downing v. Dial*.⁴⁷ In *Downing*, Downing, who was obligated under a real estate mortgage with a due on sale clause, contracted to sell the land to a purchaser. The sales contract included a provision requiring Downing to execute a conveyance to the purchaser when installments on the sales price were reduced to an amount equal to the balance due on Downing's mortgage. The purchaser was then to assume Downing's mortgage at a favorable rate of interest. However, upon proper tender by the pur-

⁴²See *Boswell v. Lyon*, 401 N.E.2d 735 (Ind. Ct. App. 1980), discussed in *Townsend, Secured Transactions and Creditors' Rights, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 494-95 (1981).

⁴³426 N.E.2d 416 (Ind. Ct. App. 1981).

⁴⁴*Id.* at 421.

⁴⁵See generally L. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP 339-42 (1950).

⁴⁶See *First Fed. Sav. & Loan Ass'n v. Arena*, 406 N.E.2d 1279 (Ind. Ct. App. 1980), discussed in *Townsend, Secured Transactions and Creditors' Rights, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 367, 381-82 (1982).

⁴⁷426 N.E.2d 416 (Ind. Ct. App. 1981).

chaser, Downing was unable to comply with the sales contract because the mortgagee would not consent to the assumption of the mortgage. Thereupon, the purchaser was forced to find new financing, which was at a higher interest rate than the original mortgage. The trial court held that because the purchaser paid off the contract with the new financing, he was entitled to damages measured by the present value of the increased finance charge payable over the same period as the original mortgage.⁴⁸ Unfortunately, the court relied upon the testimony of an "expert" banker as to the damages without disclosing the formula upon which the calculation was made. The vendor submitted no alternative proof, and the court held that in view of its own "primitive calculations," no gross error was made by the trial court.⁴⁹

Downing assumed the answer to another interesting and important issue. Was the mortgagee bank justified in refusing consent under its due on sale clause? Probably the bank refused consent because it could then increase the interest rates. This motivation raises the serious question of the bank's good faith in exercising this strange but common mortgage restraint on alienation. Some decisions elsewhere have outlawed due on sale provisions when these provisions are exercised as a device to increase interest without regard to risks.⁵⁰

4. *Acceleration.*—The general rule that a creditor, lienholder, or secured party cannot accelerate unilateral installment obligations upon default without a provision permitting acceleration was recognized in *Griese—Traylor Corp. v. Lemmons*.⁵¹ If the right of acceleration is con-

⁴⁸*Id.* at 421.

⁴⁹*Id.* The original mortgage carried interest at 6.5% with installments to run for 87 months at time of default. The new financing obtained by the purchaser was at 8% with installments running for 60 months. Installments were increased from \$2,100 monthly to \$3,041.49 monthly. Damages of \$12,006.12 were upheld. *Id.* This record as reported makes absolutely no basis upon which this award could be sustained mathematically. This reliance upon primitive mathematics strengthens this writer's opinion that the Indiana courts are easily "hoodwinked" by the mathematics of computing interest or finance charges. Much assistance is available, although not requested, from fine mathematics departments in Indiana's state universities. See Townsend, *Secured Transactions and Creditors' Rights*, 1977 Survey of Recent Developments in Indiana Law, 11 IND. L. REV. 252-53 (1975); Townsend, *Secured Transactions and Creditors' Rights*, 1973 Survey of Recent Developments in Indiana Law, 7 IND. L. REV. 226-28 (1974).

⁵⁰See *Brown v. Avemco Inv. Corp.*, 603 F.2d 136 (9th Cir. 1979); *Wellenkamp v. Bank of America*, 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978); *Continental Fed. Sav. & Loan Ass'n v. Fetter*, 564 P.2d 1013 (Okla. 1977). See generally Townsend, *supra* note 46, at 384 n.108 (1982). The United States Supreme Court recently upheld due on sale clauses executed after 1976 by federal savings and loan banks. See *Fidelity Federal Savings and Loan Ass'n v. Cuesta*, 50 U.S.L.W. 4916 (U.S. June 28, 1982) (No. 81-750).

⁵¹424 N.E.2d 173 (Ind. Ct. App. 1981) (rule applied to stock purchase agreement under which purchaser was bound by unilateral obligation to make adjusted weekly payments for stock which had been transferred). For further discussion of this case see Townsend, *supra* note 46, at 387-88.

ditional, the conditions must be met before the acceleration is permitted. This principle was applied in *Hoosier Plastics v. Westfield Savings & Loan Association*⁵² where a mortgage provided that "insurance proceeds shall be applied to restoration or repair of the Property damaged, provided such restoration or repair is economically feasible and the security . . . is not thereby impaired."⁵³ When the mortgagee refused to apply insurance proceeds towards the cost of restoration of the building destroyed by fire, the mortgagor brought suit for damages. Although the trial court dismissed the mortgagor's suit because it found no proof that the conditions had been met, the court of appeals reversed.⁵⁴ The two foregoing decisions put in jeopardy the holding of *Pearson v. First National Bank*,⁵⁵ which was a questionable decision last year. In *Pearson*, the mortgagee was allowed to accelerate and apply insurance proceeds towards the indebtedness under a similar insurance clause that provided payment to the mortgagor and mortgagee as their interests appear, but without an express provision in the mortgage for acceleration.

A mortgagee refusing to correctly credit principal payments by overcharging the interest on a mortgage loan was held liable not only for the ensuing deficiency but also for punitive damages in *Shelby Federal Savings & Loan Association v. Doss*.⁵⁶ Proof established abusive efforts by the lender to claim an increased finance charge. The decision is refreshing in that it allows a remedy to a debtor for the creditor's refusal to credit an account upon which a balance remains owing.⁵⁷ It thus becomes clear that bookkeeping entries which are intentionally incorrect become actionable although pecuniary loss may depend on future enforcement procedures.⁵⁸

⁵²433 N.E.2d 24 (Ind. Ct. App. 1982).

⁵³*Id.* at 27.

⁵⁴*Id.* at 28-29.

⁵⁵408 N.E.2d 166 (Ind. Ct. App. 1980) (allowing acceleration by mortgagee absent proof of bad faith in refusing to allow insurance proceeds to be applied towards rehabilitation of the collateral).

⁵⁶431 N.E.2d 493 (Ind. Ct. App. 1982).

⁵⁷*Id.* at 498-500. The court did not give a precise description of the theory of its remedy which seems to be in the nature of an action for disparagement of title. Cf. *Harper v. Goodin*, 409 N.E.2d 1129 (Ind. Ct. App. 1980) (recordation of false mechanic's lien and refusal to release actionable).

⁵⁸In a recent decision, *Southwest Forest Indus. v. Firth*, 435 N.E.2d 295 (Ind. Ct. App. 1982), a mechanic's lienholder who had been paid in full was bound by the ten dollars a day penalty specially applicable to mechanic's liens. See IND. CODE § 32-8-6-1 (1982) (part of mechanic's lien statute imposing penalty fifteen days after "demand" until release or expiration of lien). The terms of a general statute that imposed a penalty for refusal to release liens, that required a written demand and that imposed a cap

5. *Foreclosure Procedures.*—a. *Effect of private sale by conditional vendor and mortgagee.*—Indiana statutes mandate judicial foreclosure of real estate mortgages,⁵⁹ and under the rule of *Skendzel v. Marshall*,⁶⁰ the same applies to conditional sales contracts where more than a minimal amount has been paid on the contract. Suppose, however, that a mortgagee or conditional seller by self help regains possession and resells the property. May the lienholder recover a deficiency? It seems quite clear that a deficiency is barred if the property has been resold⁶¹ without authority from the debtor. Other aspects of this problem were dealt with by two recent decisions. A mortgagor cannot avoid liability on the indebtedness by deeding the collateral to the mortgagee with a provision that the transfer would release the debtor in the face of proof that the mortgagee refused to accept the deed.⁶² If the terms of the deed are rejected, *Ellsworth v. Homemakers Finance Service, Inc.*⁶³ holds that the mortgagee must foreclose by judicial sale, and that the ineffective deed gives no power of private sale. In *Colonial Discount Corp. v. Bowman*,⁶⁴ the seller had regained possession and resold one of three lots that were sold on conditional sales contracts, after over fifteen percent had been paid on the price.⁶⁵ A suit by the purchaser to recover damages in the county court was dismissed by the court of appeals on the ground that the county court lacked equitable jurisdiction.⁶⁶ The court of appeals obviously decided the case on a technicality to avoid a substantive question of real importance and, in doing so, erroneously⁶⁷ held that a suit in rescission for recovery of money cannot be determined at law.⁶⁸ The case, forc-

on recovery were held inapplicable. 435 N.E.2d at 296-97. See IND. CODE § 32-8-1-2 (1982) (requiring demand by registered or certified mail with a cap of \$500).

⁵⁹IND. CODE § 32-8-16-1 (1982).

⁶⁰261 Ind. 226, 301 N.E.2d 641 (1973), cert. denied, 415 U.S. 921 (1974).

⁶¹Powers v. Ford, 415 N.E.2d 734 (Ind. Ct. App. 1981) (conditional seller who accepted repossession and resold the property denied deficiency and deemed to have accepted a surrender).

⁶²Homemaker Fin. Serv., Inc. v. Ellsworth, 380 N.E.2d 1285 (Ind. Ct. App. 1978).

⁶³424 N.E.2d 166 (Ind. Ct. App. 1981). A decree on retrial awarded judgment on the mortgage indebtedness and directed the mortgagee to sell the property and apply it towards the indebtedness. *Id.* at 167. The court on second appeal ordered the property to be sold at judicial sale. *Id.* at 169.

⁶⁴425 N.E.2d 266 (Ind. Ct. App. 1981). The vendors in this case frustrated the efforts of the purchaser to resell the property by refusing to consent under a due on sale clause.

⁶⁵*Id.* One lot had been resold by the vendor for \$600 in excess of the price under the conditional sales contract. *Id.*

⁶⁶*Id.* at 268. The opinion states that the purchasers sought to enforce what amounted to an equitable lien, although this does not seem to have been asserted in the purchaser's complaint.

⁶⁷See *Ferrell v. Hunt*, 189 Ind. 45, 124 N.E. 745 (1919).

⁶⁸425 N.E.2d at 268.

ing the plaintiff to comply with a strict theory of pleading, should have been written 100 years ago.

b. *Notice to junior lienholders of foreclosure proceedings; tax and execution sales.*—It is established practice in Indiana to give known and perfected junior lienholders and owners notice of actions to foreclose mortgages and liens.⁶⁹ Failure to make such persons parties and to give them proper notice makes the sale ineffective as to their interests.⁷⁰ However, notice need not be given to junior interests in all instances. Two of these exceptions were recognized by two recent court of appeals' decisions. In *Mennonite Board of Missions, Inc. v. Adams*⁷¹ the court of appeals reiterated the rule that actual notice of a tax sale is not required to be given to mortgagees of record.⁷² In *Hines v. Behrens*,⁷³ the court held that the purchaser at an execution sale will take free of the interest of a junior mortgagee of record, even though the junior mortgagee was not made a party to the foreclosure or execution proceedings, or given formal notice of the sale.⁷⁴ The court also noted that the junior mortgagee in *Hines* had had actual notice of the sale, and thus should be bound.⁷⁵

⁶⁹IND. CODE § 32-8-18-1 (1982).

⁷⁰See *Catterlin v. Armstrong*, 101 Ind. 258 (1884); *Oldham v. Noble*, 117 Ind. App. 68, 66 N.E.2d 614 (1946).

⁷¹427 N.E.2d 686 (Ind. Ct. App. 1981).

⁷²*Id.* at 688. The mortgagee in *Mennonite* argued that the notice requirements under the tax sale statutes, IND. CODE §§ 6-1.1-24-1, -2 (1982), do not meet due process standards. The court rejected this argument relying upon *First Sav. and Loan Ass'n v. Furnish*, 174 Ind. App. 265, 367 N.E.2d 596 (1977).

⁷³421 N.E.2d 1155 (Ind. Ct. App. 1981).

⁷⁴*Id.* at 1159.

⁷⁵*Id. Hines* is an incomplete decision and will cause trouble to real estate and title lawyers for several reasons. First, the judgment debtor had executed and recorded a mortgage to the mortgagee bank before the judgment was procured by the judgment creditor. However, before the sale under the judgment, the mortgagee bank released its original mortgage and recorded this release. The mortgagee bank then took a new note and mortgage from the judgment debtor and his wife. This new mortgage was recorded at the same time as the release. Substantial authority supports the proposition that the new note and mortgage constituted a renewal and did not release the old mortgage. See *Farmers and First Nat'l Bank v. Citizens State Bank*, 211 Ind. 389, 5 N.E.2d 506 (1937). It is unclear whether the purchaser at the judgment sale should be protected as a bona fide purchaser because the sale was entered after the first mortgage had been released and the new mortgage contemporaneously executed. A purchaser, practically, may not be wise to rely upon such a release and apparent renewal as advancing a junior interest. See *id.* at 393-94, 5 N.E.2d at 508. A second point leaving uncertainty in the case is whether the judgment creditor acquired a judgment lien which predated the refinanced mortgage. If the judgment had not been properly docketed and indexed, the judgment creditor did not hold a valid judgment lien. The judgment was entered in a divorce proceeding and may not have been a lien upon the property. Cf. *Kuhn v. Kuhn*, 402 N.E.2d 989 (Ind. 1980) (order for periodic payments of child support not considered a final judgment so as to become a statutory lien upon property of obligor). If not, an execution lien procured with the issuance of a writ

c. *Foreclosure in equity.*—Recognizing that mortgage and lien foreclosures are essentially equitable, one recent decision⁷⁶ holds that the vendee's liens cannot be foreclosed in county courts without equity jurisdiction. Another indicates that legal issues under an independent counterclaim to a foreclosure action may be separately tried.⁷⁷

B. Creditors' Rights

1. *Mechanic's Liens.*—a. *Notice to entireties owners.*—Written notice of intent to claim a mechanic's lien must be given to the occupying resident owner or future occupying owner of a single or double family dwelling within thirty days from the commencement of performance for alterations and repairs and within sixty days from commencement of performance for new construction.⁷⁸ A notice naming both entireties owners that was delivered to the husband within the statutory period, but that was not delivered to the wife within that time, was held to be insufficient notice in *Bayes v. Isenberg*.⁷⁹ The case seems to hold that, absent evidence of agency, provable personal service on both entireties owners is required.⁸⁰ The *Bayes* court refused to follow a recent fourth district court of appeals' opinion, *Beneficial Finance Co. v. Wegmiller Bender Lumber Co.*,⁸¹ which held that a recorded notice naming only one entireties owner met the record requirements for notice.⁸² Although *Bayes* and *Beneficial* involve different statutes,⁸³ the rationale for holding notice to one entireties owner to

of execution had expired before the refinanced transaction. See IND. CODE §§ 34-1-45-2, 34-1-37-10 (1982). Thereafter, the sale was held under a new writ of execution long after the refinanced mortgage was of record, and the execution lien under which the sale was held would have been junior to the refinanced mortgage. The court in a footnote merely held that because the court found the mortgage to be junior and because it was supported by evidence in the stipulations, which certainly did not appear in the opinion, the purchaser at the sale took priority. The case stands only for the point that parties junior to the judgment or execution lien upon which property is sold at an execution sale are not entitled to notice of the sale. Otherwise the case is a disaster, probably because the judge felt that the facts did not deserve careful restatement.

⁷⁶Colonial Discount Corp. v. Bowman, 425 N.E.2d 266 (Ind. Ct. App. 1981); see *supra* note 64 and accompanying text.

⁷⁷Associates Fin. Servs. Co. v. Knapp, 422 N.E.2d 1261 (Ind. Ct. App. 1981). This case allowed counterclaim issues to be tried after a summary judgment on the foreclosure issues. That independent issues may be separately tried by jury, see Hartlep v. Murphy, 197 Ind. 222, 150 N.E. 312 (1926). In the *Knapp* case, the parties consented to a nonjury trial on the counterclaim.

⁷⁸IND. CODE § 32-8-3-1 (1982).

⁷⁹429 N.E.2d 654 (Ind. Ct. App. 1981).

⁸⁰*Id.* at 659.

⁸¹402 N.E.2d 41 (Ind. Ct. App. 1980).

⁸²402 N.E.2d at 46.

⁸³The statute considered in *Bayes* was IND. CODE § 32-8-3-1 (Supp. 1981). The statute under consideration in *Beneficial* was IND. CODE § 32-8-3-3 (1976). These statutes retain the same section numbers in the 1982 Indiana Code.

be sufficient would be similar in both. This is especially true in view of the fact that the wife probably authorized or assented to the construction. Thus, notice to one of several members of a joint venture should be adequate.⁸⁴

b. *Recordation of notice within sixty days of completion.*—Each mechanic claiming a lien must record notice within sixty days after completion, in accordance with the mechanic's lien statute.⁸⁵ Recordation within sixty days after corrective repairs performed at the request of the owner was held sufficient in *Smith v. Bruning Enterprises*.⁸⁶ However, *Cato v. David Excavating Co.*⁸⁷ ridiculously held that a recorded notice "upon the buildings" located on properly described real estate was insufficient when the lien was claimed only for roadwork on the property. The opinion of the court of appeals strained credibility because the court interpreted the statutory provision requiring the filing of a notice of lien to require additionally a description of the improvement. Unless reversed by opinion or legislation, the case will never serve as a model for legislative interpretation.

c. *No-lien contract.*—A "no-lien" contract in proper form is valid if recorded not more than five days after the execution of the contract.⁸⁸ In *Torres v. Meyer Paving Co.*,⁸⁹ a no-lien contract that was executed at the same time but separate from the original construction contract, and that was filed within five days of the original contract was upheld as valid. The court of appeals construed the two instruments as one and found consideration for the no-lien agreement.⁹⁰ For some reason, the court omitted reference to Trial Rule 9.1(C),⁹¹ which places upon the promisee the burden of proof for lack of consideration in the written contract. Proof of the no-lien agreement was allowed despite an integration clause in the original construction contract.

d. *Limitation upon foreclosure.*—Actions to foreclose mechanic's liens are barred unless suit is commenced within one year of recordation of the lien, or the due date of record.⁹² In *Geiger & Peters, Inc.*

⁸⁴Cf. *Sondheim v. Gilbert*, 117 Ind. 71, 18 N.E. 687 (1888) (note: the section discussing this theory was deleted in the unofficial reporter); *O'Hara v. Architects Hartung & Ass'n*, 163 Ind. App. 661, 665, 326 N.E.2d 283, 286 (1975) (co-venturers are liable to third parties for acts of their joint venturers within the scope of the enterprise).

⁸⁵IND. CODE § 32-8-3-3 (1982).

⁸⁶424 N.E.2d 1035 (Ind. Ct. App. 1981).

⁸⁷435 N.E.2d 597 (Ind. Ct. App. 1982).

⁸⁸IND. CODE § 32-8-3-1 (1982).

⁸⁹423 N.E.2d 692 (Ind. Ct. App. 1981).

⁹⁰Id. at 695.

⁹¹IND. R. TR. P. 9.1(C).

⁹²IND. CODE § 32-8-7-1 (1982).

v. American Fletcher National Bank & Trust Co.,⁹³ the filing of a cross-complaint to foreclose a lien within the one year period was held sufficient, although service was made upon party owners after the time had expired. This case recognized that suit is commenced at the time of the filing of the complaint, not at the time of service; nonetheless, the case was remanded for a hearing on the motion to dismiss because of failure to prosecute diligently the cross-complaint.

e. *Attorney fees.*—A mechanic's lienholder is entitled to reasonable attorney fees as part of his lien.⁹⁴ One exception exists in the case of a subcontractor claiming against an owner who has paid the consideration for the performance.⁹⁵ *Templeton v. Sam Klain & Son, Inc.*⁹⁶ held that if, on appeal, the mechanic lienholder successfully defends the judgment ordering foreclosure of his lien, then he is entitled to an additional fee for the reasonable services rendered on appeal. In *Templeton*, the supreme court found that the mechanic lienholder defending the challenge to the foreclosure may petition the lower court for an allowance to pay attorney fees for the appeal, but the lower court should hold its determination in abeyance until the conclusion of the appeal process.⁹⁷

The supreme court also adopted the holding of the lower court⁹⁸ decision in *Templeton* to the effect that a subcontractor is not required to apply undesignated payments received from the prime contractor to indebtedness incurred upon that project, unless the subcontractor has actual knowledge of the source of the funds;⁹⁹ there is proof of delivery of materials to the construction site which creates a presumption of incorporation into the project;¹⁰⁰ and there is a lien that may be claimed upon funds owing by the owner to the prime contractor after written notice by the subcontractor to hold the owner personally liable.¹⁰¹

2. *Exemptions and Execution.*—A most incredible decision, *Schuler*

⁹³428 N.E.2d 1279 (Ind. Ct. App. 1981).

⁹⁴IND. CODE § 32-8-3-14 (1982).

⁹⁵*Id.*

⁹⁶425 N.E.2d 89 (Ind. 1981). Cf. O.S. v. J.M., 436 N.E.2d 871 (Ind. Ct. App. 1982) (attorney fees incurred on appeal in defending paternity award).

⁹⁷425 N.E.2d at 95. In *Templeton* an additional award of \$2500 was upheld because the appellant owner failed to raise the amount as an error on appeal.

⁹⁸400 N.E.2d 1198 (Ind. Ct. App. 1980), discussed in *Townsend*, *supra* note 42, at 500, 508.

⁹⁹425 N.E.2d at 93. A recent decision also holds that absent some agreement or assumed responsibility, a mortgagee advancing funds under a construction loan to the debtor-mortgagor has no duty to ascertain that subcontractors are paid and without liens. *Spurlock v. Fayette Fed. Sav. & Loan Ass'n*, 436 N.E.2d 811 (Ind. Ct. App. 1982).

¹⁰⁰425 N.E.2d at 94.

¹⁰¹*Id.*

v. Langdon,¹⁰² in effect upheld a lower court eviction judgment that allowed the landlord, without a lien or security interest, to satisfy the judgment by executing on the personal property the tenant left behind. In addition to the eviction, the court awarded damages to the landlord for back rent and for holding over expenses. On appeal, the court considered whether any of the tenant's personal property was exempt from the landlord's judgment. The court found that the amount of damages apportioned for back rent were damages in "contract,"¹⁰³ and thus qualified under the Indiana General Exemption Law.¹⁰⁴ That portion of the damages for holding over expenses was found to be "in tort" and not subject to the statutory exemption.¹⁰⁵ The tenant, who defaulted, was denied the personal property exemption for the apportioned contract damages because he did not file a schedule of his personal property with the sheriff who was ordered to execute the judgment.¹⁰⁶ The court's decision which ignored proper procedures for execution and sale by the sheriff, service of the writ of execution, and basic due process,¹⁰⁷ makes Judge Roy Bean appear as a "boy scout." This kind of decision denying the exemption for a questionable technicality is truly incredible.¹⁰⁸

3. *Proceedings Supplemental.*—The broad equitable power of a court to reach concealed assets of a debtor was illustrated in *Coak v. Rebber*,¹⁰⁹ which was a case involving the enforcement of a judgment that had awarded support arrearages. In a proceedings supplemental, the wife had sought certain assets to satisfy the judgment. The wife had established in those proceedings that the husband's transfer of his stock, one-half ownership in a corporation, to his new wife was without a fair consideration and was thus a fraudulent con-

¹⁰²433 N.E.2d 841 (Ind. Ct. App. 1982).

¹⁰³*Id.* at 844.

¹⁰⁴IND. CODE § 34-2-28-1 (1982). In *Schuler*, the lower court specified the different amounts for back rent and holding over damages in the judgment so that the mathematics of separating the tort and contract parts of the judgment appeared in the record.

¹⁰⁵433 N.E.2d at 844.

¹⁰⁶*Id.*

¹⁰⁷See IND. CODE § 34-1-36-1 (1982); see also 433 N.E.2d at 844-47 (Staton, J., dissenting); cf. *Mims v. Commercial Credit Corp.*, 261 Ind. 591, 307 N.E.2d 867 (1974) (which indicates that where the debtor is not represented by counsel, the court must affirmatively fix the debtor's exemption).

¹⁰⁸Judge Staton's opinion revealed that the landlord retained possession of household goods worth over \$13,000 and that bits and pieces were sold by him without accounting. 433 N.E.2d at 846. It seems that the tenant may have a separate action in conversion against the landlord. In the seemingly disoriented opinion of the majority, it appears that the court approved execution by the sheriff on the remaining assets in the landlord's possession for the undetermined, unpaid part of the judgment. A reference to the law of abandonment (in this case, \$13,000 worth of property) is mystifying.

¹⁰⁹425 N.E.2d 197 (Ind. Ct. App. 1981).

veyance. The lower court thereupon directed that an obligor, who had purchased the corporation, be named as garnishee to pay one half of the contract installments of the conditional sales contract to the former wife. The court of appeals affirmed the trial court's finding that the monthly installment payments were subject to execution, although the pleadings in proceedings supplemental seeking to discover the assets did not indicate that the stock transfer was sought, and despite the fact that the corporation's obligor was not named as a party.¹¹⁰ Strict rules of pleading do not apply to proceedings supplemental and failure of the judgment debtor in the instant case to bring in the corporation under Trial Rule 19(A)¹¹¹ at the hearing was fatal to his defense. Evidence established that the entire assets of the corporation had been sold to its obligor, but neither the findings nor the evidence appeared to show that the debtor-corporation was insolvent, a usual requirement for avoiding a fraudulent conveyance which does not apply when intent to defraud is present.¹¹²

According to *American Underwriters, Inc. v. Curtis*,¹¹³ defenses of a liability insurer must be affirmatively pleaded in an action to enforce a judgment against the insured, particularly where the defense was not raised at the hearing or in an answer permissively filed in the proceedings.

Answers to interrogatories in proceedings supplemental, and probably other actions as well, must be formally offered into evidence. Hence, the court in *In re Marriage of Hudak*¹¹⁴ found that the answers to interrogatories of the garnishee defendant, which were attached to a motion for proceedings supplemental, did not support a garnishment order against the defendant's employer because the probative value of the answers could not be considered until they were offered into evidence.¹¹⁵

In other cases relating to proceedings supplemental a search of an arrestee's wallet pursuant to a lawful arrest was permitted,¹¹⁶ and a vague new standard of probable cause for inspecting premises¹¹⁷ of

¹¹⁰*Id.* at 200.

¹¹¹IND. R. TR. P. 19(A).

¹¹²*Cf. UNIFORM FRAUDULENT CONVEYANCE ACT §§ 4, 7, 7A U.L.A. 205, 242 (1978); 11 U.S.C. § 548(a)(1) and (2) (1979 & Supp. 1982).*

¹¹³427 N.E.2d 438 (Ind. 1981) (adopting opinion in 392 N.E.2d 516 (1979)). For a discussion of this case, see Townsend *supra* note 42, at 512. The effect of this decision is to make defenses and claims of garnissees in proceedings supplemental subject to the basic rules of civil procedure. Informal procedures generally followed in proceedings supplemental do not apply to the unadjudicated rights of third parties.

¹¹⁴428 N.E.2d 1333 (Ind. Ct. App. 1981).

¹¹⁵*Id.* at 1336-37.

¹¹⁶*Chambers v. State*, 422 N.E.2d 1198 (Ind. 1981).

¹¹⁷*State v. Kokomo Tube Co.*, 426 N.E.2d 1338 (Ind. Ct. App. 1981) ("legislative standards" may serve as basis for occupational safety warrant).

a business establishment may aid in defining permissible perimeters for judicial orders in proceedings supplemental, with respect to the search of a debtor's person and his property.

4. *Enforcement of Support and Property Division Orders.*—Several recent decisions concern the status of pension rights and whether pensions constitute marital property for purposes of property division. Two decisions held that pension income that was being received by a husband but was dependent upon continued survivorship may not be divided, but may be considered in the division of other property on the theory that the asset is not vested.¹¹⁸ An award may not eat into contingent pension funds and will be held improper if it exceeds present marital property.¹¹⁹ A third decision applied the same rules to a pension payable in the future and dependent upon survivorship.¹²⁰ The Supreme Court of the United States has held that military pensions, under the admonitions of the language of federal statutes, cannot be considered as marital property.¹²¹ A divorce court making a property division may cancel a debt of the husband's solely owned corporation to his wife.¹²²

With respect to support, other decisions ordered payment of support or maintenance from unemployment compensation payments¹²³ and social security,¹²⁴ which otherwise are exempt from the creditor process.¹²⁵

The rule of *Kuhn v. Kuhn*,¹²⁶ that an installment support order may not be enforced by way of execution and supplementary remedies without a judicial determination of the amounts overdue and owing, was recognized in *Statzell v. Gordon*.¹²⁷ The court properly held,

¹¹⁸See *In re Marriage of Delgado*, 429 N.E.2d 1124 (Ind. Ct. App. 1982); *Sadler v. Sadler*, 428 N.E.2d 1305 (Ind. Ct. App. 1981).

¹¹⁹428 N.E.2d 1305 (Ind. Ct. App. 1981) (army pension).

¹²⁰*In re Marriage of Sharp*, 427 N.E.2d 690 (Ind. Ct. App. 1981), *reh'g granted*, 430 N.E.2d 417 (Ind. Ct. App. 1982) (on issue of trial court relinquishing jurisdiction).

¹²¹*McCarty v. McCarty*, 453 U.S. 210 (1981) (pension found not subject to community property by divided court). The decision was recognized by *Sadler v. Sadler*, 428 N.E.2d 1305 (Ind. Ct. App. 1981).

¹²²*White v. White*, 425 N.E.2d 726 (Ind. Ct. App. 1981) (corporation not made a party by either husband or wife).

¹²³*In re Marriage of Church*, 424 N.E.2d 1078 (Ind. Ct. App. 1981). For further discussion of this case, see Buck, *Domestic Relations, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 171, 185 (1983).

¹²⁴*Paxton v. Paxton*, 420 N.E.2d 1346 (Ind. Ct. App. 1981).

¹²⁵Cf. 42 U.S.C. § 659(a) (Supp. IV 1980) (United States subject to legal process in like manner and to same extent as a private person if action brought for enforcement of legal obligations to provide child support or make alimony payments); IND. CODE § 22-4-33-3 (1982) (assignment or pledge of any rights to benefits void and such rights to benefits exempt from levy or execution until benefits actually received).

¹²⁶402 N.E.2d 989 (Ind. 1980).

¹²⁷427 N.E.2d 732 (Ind. Ct. App. 1981). For further discussion of this case, see Buck, *supra* note 123, at 180.

however, that a separate suit for this purpose was not necessary; a petition under the original cause number by motion to establish unpaid and overdue support payments was proper. Seemingly, joinder of a prayer for this relief in connection with a motion for proceedings supplemental or contempt is proper. Once a definite judgment is entered for arrearages in support, several recent decisions allowed the enforcement by proceedings supplemental.¹²⁸ The limitation period for enforcing overdue support payments is now ten years.¹²⁹ Difficulty with successive suits to establish the amount of overdue support is illustrated in *White v. Davis*,¹³⁰ in which rules of res judicata were twisted to give the wife the benefit of the doubt by holding that failure of prior proceedings to fix arrearages did not constitute a negative judgment.¹³¹

Decisions in this area also reiterate established rules to the effect that maintenance and support orders cannot later be modified with respect to past or overdue payments.¹³² In one recent case, the court acknowledged that an exception to these rules may exist where the obligor has assumed custody and payment of all expenses of the child; however, the court did not apply this exception to the instant case.¹³³ Support and maintenance orders may be altered prospectively.¹³⁴ If the amount payable may be reduced because of the emancipation of some but not all of the children, a court order must be obtained and it is effective prospectively.¹³⁵ An overpayment of support, made by agreement of the parties but without court approval, cannot be recovered or recouped.¹³⁶ While credit for support payments made directly to children will not be allowed if not required by the support order,¹³⁷ it was recently held that a husband should not be found in contempt for making support payments directly to the wife contrary to a decree requiring payments to the clerk.¹³⁸

Property division orders are not ordinarily modifiable, either pro-

¹²⁸See, e.g., *Coak v. Rebber*, 425 N.E.2d 197 (Ind. Ct. App. 1981) (court set aside fraudulent conveyance of stock and allowed decree against obligor of corporation to extent of husband's one-half interest in the corporation). Cf. *In re Marriage of Hudak*, 428 N.E.2d 1333 (Ind. Ct. App. 1981) (garnishment order denied because garnishee liability was not established through failure to introduce interrogatories into evidence).

¹²⁹IND. CODE § 34-1-2-3 (1982).

¹³⁰428 N.E.2d 803 (Ind. Ct. App. 1981).

¹³¹*Id.* at 805-06.

¹³²See *Isler v. Isler*, 422 N.E.2d 416 (Ind. Ct. App. 1981), discussed in Buck, *supra* note 123, at 178; *Breedlove v. Breedlove*, 421 N.E.2d 739 (Ind. Ct. App. 1981).

¹³³425 N.E.2d 667 (Ind. Ct. App. 1981).

¹³⁴*In re Marriage of Sharp*, 427 N.E.2d 690 (Ind. Ct. App. 1981).

¹³⁵*Reffeitt v. Reffeitt*, 419 N.E.2d 999 (Ind. Ct. App. 1981).

¹³⁶*In re Marriage of Bradach*, 422 N.E.2d 342 (Ind. Ct. App. 1981).

¹³⁷*Breedlove v. Breedlove*, 421 N.E.2d 739 (Ind. Ct. App. 1981).

¹³⁸*Castro v. Castro*, 436 N.E.2d 366 (Ind. Ct. App. 1982).

spectively or retrospectively,¹³⁹ but interpretation of a nonmodifiable property division or support order may be procured to avoid uncertainties.¹⁴⁰ Vagueness or uncertainty of a property division order is a cause for remand in a direct appeal.¹⁴¹

5. *Receiverships.*—By statute, a receiver may be appointed at the request of the Indiana Securities Commissioner to oversee the assets of a person who violates Indiana securities laws.¹⁴² Where a receiver was appointed at the request of the Commissioner, *State ex rel Higbie v. Porter Circuit Court*¹⁴³ held that judgment creditors could not enforce their rights against the receivership debtors by execution but the judgment creditors must work out their claims through the receiver.¹⁴⁴

6. *Decedents' Estates.*—Ordinarily a claim against a person who dies must be filed with the estate within five months of the first published notice to creditors, and the estate must have been opened within one year of death.¹⁴⁵ Several qualifications to this nonclaim statute were involved in recent decisions. A special statutory rule¹⁴⁶ allowing tort claims covered by liability insurance to be presented within the non-estate time limitation was construed in *Pasley v. American Underwriters, Inc.*¹⁴⁷ The court of appeals in *Pasley* held that a direct suit by the tort claimant against the heirs or devisees of a decedent was not properly filed because the plaintiff failed to have the estate opened and an administrator appointed, within the non-estate time limitation.¹⁴⁸ Since the statute of limitations on the tort claim expired one day after the suit was filed, but before an opening of the estate, the claim was barred. In *Pasley*, form won over

¹³⁹*In re Marriage of Bradach*, 422 N.E.2d 342 (Ind. Ct. App. 1981) (order may be reopened under IND. R. TR. P. 60).

¹⁴⁰*TeWalt v. TeWalt*, 421 N.E.2d 415 (Ind. Ct. App. 1981) (husband, under writ of assistance, procured court commissioner to hold disputed funds).

¹⁴¹*In re Marriage of Owens*, 425 N.E.2d 222 (Ind. Ct. App. 1981) (spouses made co-owners with uncertain accounting responsibilities).

¹⁴²IND. CODE § 23-2-1-17.1 (1982).

¹⁴³428 N.E.2d 782 (Ind. 1981) (court denied writ of prohibition sought by judgment creditors who were enjoined by lower court from enforcing judgments by way of execution). For further discussion of this case, see Galanti, *Business Associations*, 1982 *Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 25, 32 (1983).

¹⁴⁴428 N.E.2d at 783-84. For an interesting decision involving the power of an Indiana insurance receiver to adjudicate rights to a deposit fund held by another state, see *Underwriters Nat'l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Ass'n*, 102 S. Ct. 1357 (1982).

¹⁴⁵IND. CODE § 29-1-14-1(a), (b), (d) (1982).

¹⁴⁶IND. CODE § 29-1-14-1(f) (1982).

¹⁴⁷433 N.E.2d 838 (Ind. Ct. App. 1982) (noting that the statute provides for suit by the tort claimant against the "estate" which may be opened up within the tort "limitations" period).

¹⁴⁸*Id.* at 840.

substance,¹⁴⁹ again justifying lay suspicions that administration of decedents' estates is not in good hands. However, faith in the system will be found in *First National Bank & Trust Co. v. Coling*,¹⁵⁰ which allowed a claim that had been erroneously filed. In *Coling*, the court clerk had filed the claim under the same cause number as a will contest petition in the same action.

An owner of property that is in the possession of a decedent's estate or his successor is not a creditor in the sense that he must file a claim within time limits or be forever barred.¹⁵¹ Although he must file to recover from the representative within five months from the first published notice to creditors,¹⁵² he may establish his property rights against heirs and devisees outside the statutory time limit for claims against the estate. This rule was recognized and applied in *Williams v. Williams*,¹⁵³ in which the decedent had agreed to sell his one-half ownership in a corporation to the surviving shareholders. Although the surviving shareholders failed to file their action against the personal representative within the five month period,¹⁵⁴ on the basis of equitable conversion the shareholders were able to enforce specific performance against the heirs and devisees.¹⁵⁵

While an unpaid award of property division to a spouse will survive the death of the obligor,¹⁵⁶ *Hicks v. Fielman*¹⁵⁷ holds that if the decree is based upon a settlement which indicates that installments are made as alimony and conditional upon events indicating that the payments are intended as maintenance,¹⁵⁸ the claim dies with the

¹⁴⁹Because the tort statute of limitations is not a bar statute, the case clearly fell within IND. R. TR. P. 15(c) if an amendment named a representative with prior knowledge of the suit—particularly the insurer. That the insurer is the real party in interest, see *Jenkins v. Nachand*, 154 Ind. App. 672, 290 N.E.2d 763 (1972) (dead man's statute did not bar testimony of tort claimant whose claim was covered by insurance).

¹⁵⁰419 N.E.2d 1326 (Ind. Ct. App. 1981) (error corrected by Trial Rule 60(B) motion).

¹⁵¹*Beach v. Bell*, 139 Ind. 167, 38 N.E. 819 (1894); *Paidle v. Hestad*, 169 Ind. App. 370, 348 N.E.2d 678 (1976).

¹⁵²IND. CODE § 29-1-14-21 (1982); *Estate of Williams*, 398 N.E.2d 1368 (Ind. Ct. App. 1980).

¹⁵³427 N.E.2d 727 (Ind. Ct. App. 1981), *reh'g granted*, 432 N.E.2d 417 (Ind. Ct. App. 1982). For further discussion of this case, see Falender, *Trusts and Decedents' Estates, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 415, 419 (1983).

¹⁵⁴The shareholders in this case were denied a right to litigate their claim by proceedings against the estate in *Estate of Williams*, 398 N.E.2d 1368 (Ind. Ct. App. 1980). Dismissal was on the apparent basis that the probate court lacked jurisdiction, and therefore did not go to the merits.

¹⁵⁵427 N.E.2d at 731. See *Townsend*, *supra* note 42, at 519-20.

¹⁵⁶See *White v. White*, 167 Ind. App. 459, 338 N.E.2d 749 (1975); cf. *Miller v. Clark*, 23 Ind. 370 (1864) (arrears of alimony may be collected by administrator after death).

¹⁵⁷421 N.E.2d 716 (Ind. Ct. App. 1981).

¹⁵⁸*Id.* at 722. Under present Indiana law, alimony or maintenance seemingly is allowed to a spouse only for physical or mental incapacity or when it is included in the

obligor. In *Hicks*, the payments were made dependent on the non-death and non-remarriage of the obligee, and reducible on the retirement of the husband-obligor. This follows the established rule that contingent support obligations which are not overdue do not survive,¹⁵⁹ an outmoded principle which is now rejected by statute with respect to the judicially ordered duty of parents to support children.¹⁶⁰

7. *Bankruptcy.*—With the new Bankruptcy Code in full operation and with the overwhelming number of bankruptcy court opinions, a number of cases deserve the brief attention of Indiana lawyers. The Indiana law allowing revocation of a nonpaying judgment debtor's driver's license¹⁶¹ conflicts with the bankruptcy law to the extent that the statute is enforceable after the debtor has been discharged in bankruptcy.¹⁶² A claim for money was held nondischargeable because the bankrupt had misrepresented the purpose for which he had obtained the money and thus the creditor was induced by false pretenses to make the loan.¹⁶³ A decree approving a property settlement in which the husband was to pay installments on a mobile home was held dischargeable in *In re Frey*.¹⁶⁴ However, attorney fees assessed to the wife in contempt proceedings to enforce the decree were held to be for maintenance and nondischargeable in *Frey*.¹⁶⁵ The court in *In re Maitlen*,¹⁶⁶ on the other hand, held nondischargeable the husband's obligation to pay the mortgage on the home to be occupied by the wife and child. In *Maitlen*, the obligation arose from a settlement agreement approved by the court. This obligation was contained in a paragraph immediately following a paragraph which provided for support to a child. The agreement also included a provision terminating the mortgage payment obligation on death or remarriage of the wife. The Court of Appeals for the Seventh Circuit concluded that these factors indicated the obligation was in the nature of support rather than property division and was thus nondischargeable.¹⁶⁷

parties' property settlement agreement which is approved by the court. IND. CODE §§ 31-1-11.5-9(c), -10(b) (1982). The court is without power to award maintenance absent these conditions. *Whaley v. Whaley*, 436 N.E.2d 816 (Ind. Ct. App. 1982) (holding illegal a provision that made property division payments dependent upon survivorship).

¹⁵⁹McKamey v. Watkins, 257 Ind. 195, 273 N.E.2d 542 (1971).

¹⁶⁰Support orders survive the death of the obligor, subject, however, to modification. IND. CODE § 31-1-11.5-17(b) (1982).

¹⁶¹IND. CODE § 9-2-1-6 (1982).

¹⁶²*Perkinson v. Woody*, 419 N.E.2d 1306 (Ind. 1981) (declaring IND. CODE § 39-2-1-11(c) unconstitutional in violation of supremacy clause).

¹⁶³*In re Pappas*, 661 F.2d 82 (7th Cir. 1981) (applying 11 U.S.C. § 35(a)(2) (1976) which was repealed in 1978; current version at 11 U.S.C. § 523(a)(2) (Supp. IV 1980)).

¹⁶⁴13 Bankr. 12 (S.D. Ind. 1981).

¹⁶⁵*Id.* at 14.

¹⁶⁶658 F.2d 466 (7th Cir. 1981).

¹⁶⁷*Id.* at 467.

Unperfected security agreements were invalidated under the strong arm provision of the Bankruptcy Code in *In re Lintz West Side Lumber, Inc.*¹⁶⁸ because the debtor was incorrectly named, and in the questionable case of *In re Rex Printing, Inc.*¹⁶⁹ because the security agreement of a corporation was signed by officers without indicating the capacity in which they signed. To the extent that it operated retrospectively, section 522 of the Bankruptcy Code that allows a debtor to claim as exempt certain nonpurchase money, nonpossessory security interests in household goods was held unconstitutional by a bold local bankruptcy judge.¹⁷⁰ This problem is now before the United States Supreme Court.¹⁷¹ Future rights to army retirement payments were found exempt in *In re Harte*.¹⁷² In deciding this case, the court applied a nonbankruptcy federal law.¹⁷³ The loan value of a debtor's life insurance policies, which are payable to the wife, children and creditors, is also exempt under Indiana law.¹⁷⁴ The court in *In re Johnson*¹⁷⁵ held that a Chapter 13 plan to avoid nondischargeability of a student loan, the debtor's only debt, was not proposed in good faith. The court in *In re Miller*¹⁷⁶ disapproved a Chapter 13 cramdown plan which contemplated installment payments toward a motor vehicle loan for its value, but which failed to include a lien thereon, interest, a cushion for depreciation, and a showing of need for the asset as transportation for the debtor.

The plight of a tort creditor of the bankrupt when his claim is covered by liability insurance was clarified in *In re Holtkamp*.¹⁷⁷ The court lifted the automatic stay and allowed the creditor to litigate his action in state court in view of the fact that estate assets were not jeopardized. However, it seems that the bankruptcy court should retain jurisdiction to assure fair distribution among competing tort claimants when the insurance fund is inadequate.

8. *Suretyship.*—The folly of signing suretyship agreements makes its appearance in hard times when special rules of suretyship law

¹⁶⁸655 F.2d 786 (7th Cir. 1981).

¹⁶⁹14 Bankr. 403 (N.D. Ind. 1981).

¹⁷⁰Henderson v. Beneficial Fin. Co., 10 Bankr. 19 (N.D. Ind. 1980). A retrospective law requiring a specified debtor in reorganization to pay employees displacement allowances was held unconstitutional as not meeting the uniformity requirement of the constitutional provision granting Congress power to adopt bankruptcy laws. Ry. Labor Executives Ass'n v. Gibbons, 102 S. Ct. 1169 (1982).

¹⁷¹Rodrock v. Sec. Indus. Bank, 642 F.2d 1193 (10th Cir. 1981), *prob. juris. noted sub nom.* United States v. Sec. Indus. Bank, 50 U.S.L.W. 3486 (Dec. 14, 1981) (No. 81-184).

¹⁷²10 Bankr. 11 (N.D. Ind. 1981).

¹⁷³See 10 U.S.C. § 1315 (1976).

¹⁷⁴*In re Tenant*, 15 Bankr. 502 (N.D. Ind. 1981).

¹⁷⁵17 Bankr. 78 (S.D. Ind. 1981).

¹⁷⁶13 Bankr. 110 (S.D. Ind. 1981).

¹⁷⁷669 F.2d 505 (7th Cir. 1982).

recognizing that foolishness often come into play. Three recent decisions deal with these depression-oriented problems. However, the court in *American Fletcher National Bank & Trust Co. v. Pavilion, Inc.*,¹⁷⁸ refused to allow sureties to escape responsibility when the creditor lied to them with respect to the contents of the surety contract.¹⁷⁹ Parol evidence that a construction loan was not to be included in an all-encompassing contract of continuing guaranty was excluded after the court delivered a misguided lecture to the effect that businessmen should read and understand what they sign.¹⁸⁰ The case writes into law the lowest possible common denominator of business ethics under the guise of the parol evidence rule.¹⁸¹

Sureties signing a note were bound although two of the sureties named in the note did not sign in *Parrish v. Terre Haute Savings Bank*.¹⁸² No evidence was introduced showing that their signatures were conditional upon all parties signing. The court in *Zack v. Smith*¹⁸³ held that a wife is not liable upon a loan procured by the husband alone, although the proceeds were used in a partnership or joint business venture. One recent decision¹⁸⁴ held that the husband is not liable for the wife's medical expenses¹⁸⁵ and another indicated to the contrary,¹⁸⁶ but the former recognized that marital assets are secondarily responsible—a refreshing new idea recognizing a type of common law community ownership.

C. Miscellaneous

Many troubles have been experienced with the law governing the assessment of reasonable attorney fees provided by agreement or statute. The Indiana Supreme Court has made it clear that a right

¹⁷⁸434 N.E.2d 896 (Ind. Ct. App. 1982).

¹⁷⁹*Id.* at 906.

¹⁸⁰*Id.* at 905-07.

¹⁸¹The decision excluded an admission by the lender that the construction loan was not included within the broad language of the guarantee. *Id.* at 905. For a decision to the contrary, compare *Hancock County Bank v. American Fletcher Nat'l Bank & Trust Co.*, 150 Ind. App. 513, 276 N.E.2d 580 (1972) (open-end pledge agreement). The court in *Pavilion* overlooked the fact that the type of continuing guaranty contract here involved required a two-hour law school course of study to understand its many ramifications—one of which is the probability that the surety promise remained revocable by the sureties until credit was extended. Hence, a parol agreement that it would not apply to a specified later loan was not inconsistent with the writing.

¹⁸²431 N.E.2d 132 (Ind. Ct. App. 1982).

¹⁸³429 N.E.2d 983 (Ind. Ct. App. 1982).

¹⁸⁴*Memorial Hosp. v. Hahaj*, 430 N.E.2d 412 (Ind. Ct. App. 1982).

¹⁸⁵See *id.* at 416.

¹⁸⁶*Collection Bureau of Warrick County, Inc. v. Sweeny*, 434 N.E.2d 143 (Ind. Ct. App. 1982) (the court appeared equally persuaded by the parental obligation of the husband to pay for the expenses attendant upon the birth of his child).

to reasonable attorney fees includes those incurred in defending an appeal;¹⁸⁷ it remains to be settled whether the right to attorney fees would include expenses in successfully prosecuting an appeal. The right to post-judgment attorney fees and interest obligations may be ascertained by motion or proceedings in the nature of proceedings supplemental, and if incurred upon appeal, are to be assessed by the trial court after the appeal is determined.¹⁸⁸ Numerous decisions remind lawyers that claims for reasonable attorney fees should be accompanied by competent proof.¹⁸⁹

Consumer legislation received some attention in the last year. On rehearing, the court in *Noel v. General Finance Corp.*¹⁹⁰ determined that a consumer loan note covering after-acquired consumer goods was improper because the security interest was not limited to collateral acquired within ten days of the giving of value. The United States Supreme Court interpreting the Truth in Lending Act held that consumer credit sale assignees who made final approval of the credit transaction were "creditors" within the meaning of the law.¹⁹¹ A finance company was allowed to sell household insurance to borrowers on a voluntary basis, although householders were also covered by homeowner's policies in *Department of Financial Institutions v. Beneficial Finance Co.*¹⁹² The practice was challenged by a provision of the Uniform Consumer Credit Code¹⁹³ prohibiting charges for insurance unless it covers a substantial risk of loss in consumer transactions. The court correctly noted that the insurance paid off at

¹⁸⁷Templeton v. Sam Klain & Son, Inc., 425 N.E.2d 89 (Ind. 1981) (mechanic's lien). For further discussion, see *supra* note 96 and accompanying text.

¹⁸⁸*Id.* at 94-95. See also *Indiana State Dep't of Revenue v. Davies*, 421 N.E.2d 688 (Ind. Ct. App. 1981) (action by taxpayer to collect interest on prior money judgment against the Department of Revenue).

¹⁸⁹E.g., *Leibowitz v. Moore*, 436 N.E.2d 899 (Ind. Ct. App. 1982) (\$580 per hour unreasonable); *Henry B. Gilpin Co. v. Moxley*, 434 N.E.2d 914 (Ind. Ct. App. 1982) (layman creditor's affidavit insufficient to support summary judgment of \$8500 for attorney fees); *Parrish v. Terre Haute Sav. Bank*, 431 N.E.2d 132 (Ind. Ct. App. 1982) (testimony of bank officer as to what fee attorney would charge to enforce note of bank held insufficient to establish \$5000 attorney fee). Cf. *In re Marriage of McBride*, 427 N.E.2d 1148 (Ind. Ct. App. 1981) (meager proof established \$75 an hour for chief attorney and \$50 for associate and no proof of customary fees in locality where suit filed); *In re Marriage of Gray*, 422 N.E.2d 696 (Ind. Ct. App. 1981) (judicial notice of attorney fees in excess of expert testimony is not abuse of discretion).

¹⁹⁰421 N.E.2d 25, *reh'g* 419 N.E.2d (Ind. Ct. App. 1981).

¹⁹¹*Ford Motor Credit Co. v. Cenance*, 452 U.S. 155 (1981) (statement on contract notifying debtor of assignment sufficient disclosure of assignee's creditor status). In another decision, the Supreme Court held that assignment of unearned property damage insurance premiums was not a separate "security interest" required to be disclosed. *Anderson Bros. Ford v. Valencia*, 425 U.S. 205 (1981) (four justices justifiably dissenting).

¹⁹²426 N.E.2d 711 (Ind. Ct. App. 1981).

¹⁹³IND. CODE § 24-4.5-4-301 (1982).

replacement cost whereas most homeowner policies are limited to cash value thus justifying the practice of making the insurance available.

Finally, during the survey period, creditors, either directly or inferentially, were awarded by the courts some favorable rulings allowing them to intimidate debtors. A bill collector, for example, may enter a debtor's home, terrorize the debtor's wife and children by subjecting the husband and father to a beating all without incurring liability for any mental distress suffered by the debtor's family.¹⁹⁴

¹⁹⁴Elza v. Liberty Loan Corp., 422 N.E.2d 760 (Ind. Ct. App. 1981), *transfer denied*, 426 N.E.2d 1302 (Ind. 1981) (Hunter, J., dissenting). The decision was based upon the questionable Indiana rule requiring physical impact for emotional injuries of this type.

XV. Social Security and Public Welfare

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This inaugural Survey Article recognizes the substantial and increasing importance of Indiana law and of the relationship between state and federal law in the frequently litigated area of social security and public welfare. As is typical of the area, the relevant law has changed rapidly on several fronts during the past survey period. If any underlying theme emerges, it is that of an increased tension between the laudable goals of welfare-oriented policies and perceived budgetary constraints. A generally positive result of this unfortunate clash of priorities has been an enhanced concern for program fiscal integrity.

A. Indiana Medicaid Law

1. *Medicaid Co-Payments and Injunctive Relief.*—In *Claus v. Smith*,¹ the plaintiff Medicaid recipients sought to preliminarily enjoin the Indiana Department of Public Welfare from requiring, in its discretion, nominal payments by a recipient for certain nonmandatory Medicaid services.² The district court ordered the injunction based on findings of a substantial likelihood of plaintiffs' success on the merits and of irreparable harm to the plaintiffs were the co-payment scheme to be effected.³

Of interest in this case was the unusually generous irreparable harm determination. The court found that such harm was "certain to result in this case"⁴ but went on to elaborate that:

The plaintiffs . . . may not be able to afford the nominal co-payment. Thus, the imposition of a co-payment requirement may result in their failure to obtain certain non-mandatory Medicaid services. Failure to obtain medical services can result

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¹519 F. Supp. 829 (N.D. Ind. 1981).

²The Indiana statutory authority for imposing these charges is IND. CODE § 12-1-7-16(c), (d) (Supp. 1981) (amended 1982 to exempt additional nonmandatory services from being subject to co-payment). IND. CODE § 12-1-7-14.9 (Supp. 1981) (amended 1982), referred to in statutory subsection (c) above, was construed in *Wilson v. Stanton*, 424 N.E.2d 1042 (Ind. Ct. App. 1981).

³519 F. Supp. at 831. *Contra Crane v. Mathews*, 417 F. Supp. 532, 539-40 (N.D. Ga. 1976). Experimental co-payment requirements have been upheld under Medi-Cal in California Welfare Rights Org. v. Richardson, 348 F. Supp. 491 (N.D. Cal. 1972).

⁴519 F. Supp. at 831. The court in *Crane v. Mathews* found the threatened harm too speculative. 417 F. Supp. at 540. The court in *Claus* may have considered *Crane* irrelevant in view of the temporary nature of the co-payment program in *Crane*.

in medical problems becoming worse or even untreatable. Implementation of the co-payment scheme would result in irreparable harm to the plaintiffs.⁵

Given this language and the absence of a finding that the plaintiffs would require nonexempt, nonmandatory Medicaid services, and particularly in light of the Department's statutory discretion to waive co-payment requirements in cases of undue hardship,⁶ any irreparable harm threatened in this case would, in the court's own implicit admission, seem highly contingent and speculative rather than "certain."

Elsewhere, a court has held that "[a]llegations of mere speculative or contingent injury, with nothing to show in fact that it will occur, are insufficient to support a prayer for injunctive relief."⁷ This restrictive approach to injunctive relief is grounded in the traditional cautious reluctance to grant such an extraordinary remedy.⁸ It may be argued, though, that the court in *Claus* did no more than extend the kind of interest-balancing undertaken in a due process context by the Supreme Court in *Goldberg v. Kelly*⁹ to the context of a preliminary injunction request.

2. *Medicaid Reimbursement and Subrogation Rights.*—In *State v. Cowdell*,¹⁰ the State of Indiana and the Department of Public Welfare appealed a circuit court judgment awarding them only a one-fifth reimbursement of Medicaid funds expended by them from the proceeds of a litigation settlement between the Medicaid recipient and the injuring party. On appeal, no abuse of discretion was found.¹¹

The plaintiffs in this case relied on a state administrative regulation allowing state subrogation to the claims of Medicaid recipients "to the extent of Medicaid benefits received by the recipients . . .".¹² On appeal, the court found this language consistent with the nature of subrogation as an equitable doctrine, the extent of its application, therefore, being subject to the equities of the particular case.¹³ In this

⁵519 F. Supp. at 831 (emphasis added).

⁶IND. CODE § 12-1-7-16(d) (1982).

⁷*Stephens v. Bacon Park Comm'r's*, 212 Ga. 426, 428, 93 S.E.2d 351, 351-52 (1956). See also *Powell v. Garmany*, 208 Ga. 550, 67 S.E.2d 781 (1951).

⁸See, e.g., *Barcelo v. Brown*, 478 F. Supp. 646 (D.P.R. 1979); *Orion Broadcasting, Inc. v. Forsythe*, 477 F. Supp. 198 (W.D. Ky. 1979); *Rivera v. Blum*, 98 Misc. 2d 1002, 420 N.Y.S.2d 304 (Sup. Ct. 1978).

⁹397 U.S. 254, 261 (1970) (balancing "brutal need" against possible additional public expense in passing on the need for a pretermination hearing for welfare recipients).

¹⁰421 N.E.2d 667 (Ind. Ct. App. 1981).

¹¹*Id.* at 672.

¹²470 IND. ADMIN. CODE § 5-1-11 (1979). County departments of public welfare are now accorded subrogation rights under IND. CODE § 12-5-6-9 (1982). The federal statute and regulation mandating this subrogation action were discussed in another context in 81 Op. Att'y Gen. 15 (May 15, 1981).

¹³421 N.E.2d at 671.

instance, however, the only unaccounted-for equity was the plaintiffs' failure to pay their pro rata share of the Medicaid recipient's attorney fees in obtaining the tort settlement. Although the court cited an analogous New Mexico case¹⁴ involving an almost equally serious disparity between the subrogation award and extent of the subrogee's payment to the subrogator, the court failed to give guidance as to its reasoning in finding no abuse of discretion in the trial court award. Examples of more explicitly justified and more generous subrogation awards, however, can be found in Indiana and elsewhere.¹⁵

3. Deemed Availability of Noninstitutionalized Spouse's Funds for Medicaid Eligibility Purposes.—*Brown v. Smith*¹⁶ was the result of the Supreme Court's memorandum decision in *Stanton v. Brown*¹⁷ to vacate the Seventh Circuit's judgment in *Brown v. Stanton*¹⁸ and to remand the case in light of the Supreme Court case of *Schweiker v. Gray Panthers*.¹⁹

In *Gray Panthers*, the Court had held that, for Medicaid entitlement and benefit amount determinations, Congress had authorized²⁰ the states, under appropriate circumstances, to impute to an institutionalized spouse the income or resources of a noninstitutionalized spouse.²¹ The Court stated that:

"Available" resources are different from those *in hand*. We think that the requirement of availability refers to resources left to a couple after the spouse has deducted a sum on which to live. It does not, as respondent argues, permit the State only to consider the resources actually paid by the spouse to the applicant.²²

The Court cited Judge Pell's opinion, concurring in part and dissenting in part in *Brown v. Stanton*, for the impracticality of requiring states to first adjust upwards the institutionalized spouse's Medicaid

¹⁴White v. Sutherland, 92 N.M. 187, 585 P.2d 331 (1978).

¹⁵See, e.g., Home Owners' Loan Corp. v. Henson, 217 Ind. 554, 29 N.E.2d 873 (1940); Reserve Loan Life Ins. Co. v. Dulin, 69 Ind. App. 363, 122 N.E. 3 (1919). See also Stanford v. Aulick, 124 Ariz. 487, 605 P.2d 465 (1979); Colonial Penn Ins. Co. v. Ford, 172 N.J. Super. 242, 411 A.2d 736 (Law Div. 1979); Columbia County v. Randall, 49 Or. App. 643, 620 P.2d 937 (1980). If the Department acts before final settlement, the *Cowdell* subrogation problem may now be avoidable under a new provision of the Indiana Code. IND. CODE § 12-1-7-24.6 (1982).

¹⁶662 F.2d 464 (7th Cir. 1981).

¹⁷453 U.S. 97 (1981).

¹⁸617 F.2d 1224 (7th Cir. 1980).

¹⁹453 U.S. 34 (1981).

²⁰See 42 U.S.C. § 1396a(a)(17)(B), (D) (1976). The provision is discussed in another context in 81 Op. Att'y Gen. 15 (May 11, 1981).

²¹453 U.S. at 48.

²²*Id.* (emphasis in the original).

benefits and then proceed under a state spousal support statute to attempt to obtain reimbursement from a recalcitrant noninstitutionalized spouse.²³

On remand, the court in *Brown v. Smith* held that although *Gray Panthers* had sanctioned, in the abstract, Medicaid deemng or the imputation of spousal income, the Court had left untouched the requirement of an "individualized factual determination of the noninstitutionalized spouse's needs in computing the potentially available funds subject to deemng."²⁴ This requirement seems administratively manageable as long as the burden of showing unavailability of the apparently available funds is shouldered by the claimant's spouse with some verification of expenses required. The cost of individualized determinations would further seem worth paying if such a procedure obviated any necessity for a divorce or for a reduction in part-time work effort based on the press of financial necessity.

4. *Medicaid Benefit Termination and the Exhaustion Requirement.*—In *Evans v. Stanton*,²⁵ the court of appeals upheld the dismissal of the plaintiff's complaint against the Indiana and Marion County Departments of Public Welfare. The plaintiff's Medicaid benefits had been terminated without a prior hearing because of the plaintiff's failure to timely file for appeal. The plaintiff sought reinstatement, damages for medical expenses and due process violations, attorney fees, class action certification, and declaratory and injunctive relief.

The court of appeals, in this case, required exhaustion of administrative remedies on the grounds that the plaintiff's constitutional claims were pressed not alone but in conjunction with unresolved factual claims regarding his continuing eligibility and on the grounds that "expedient administrative procedures" were available.²⁶ An additional consideration was the Public Welfare Departments' relative expertise in administering the challenged regulations.²⁷

Waiver of administrative exhaustion requirements has been recommended under similar circumstances.²⁸ The appellate court referred

²³*Id.* at 46. Judge Pell's language has been further quoted by Chief Justice Burger, dissenting in *Herweg v. Ray*, 102 S. Ct. 1059, 1069 (1982). *Gray Panthers* is discussed briefly in Note, 20 J. FAM. L. 369 (1982).

²⁴662 F.2d at 468 (citing *Schweiker v. Gray Panthers*, 453 U.S. 34, 49 n.21 (1981)). The Seventh Circuit's prior discussion of this requirement is in *Brown v. Stanton*, 617 F.2d 1224, 1227-28 (7th Cir. 1980).

²⁵419 N.E.2d 253 (Ind. Ct. App. 1981).

²⁶*Id.* at 255. Compare *id.* (no finding of such severe or imminent harm as would justify waiver of exhaustion) with *Claus v. Smith*, 519 F. Supp. 829, 831 (N.D. Ind. 1981) (finding irreparable harm substantial enough to justify preliminary injunction). See *supra* text accompanying notes 4-6.

²⁷419 N.E.2d at 255 (discussing 470 IND. ADMIN. CODE § 9-7-3 (1979)).

²⁸See Rosenberg, *Overseeing the Poor: A Legal-Administrative Analysis of the Indiana Township Assistance System*, 6 IND. L. REV. 385, 393-94 (1973).

to several Indiana exhaustion cases²⁹ without discussing the occasionally illuminating and generally more liberal federal authority. The holding in *Evans* may be instructively contrasted with that of the Supreme Court in the well-known case of *Mathews v. Eldridge*,³⁰ as acutely expounded by Professor Davis:

The holding [of *Eldridge*] is, in precise terms, that a reviewing court may decide a question not raised before the agency and may decide a constitutional issue when the moving party has not exhausted administrative remedies on nonconstitutional issues . . . even when "the only avenue for judicial review" is a statute which requires exhaustion "as a jurisdictional prerequisite," . . . even when the party seeking review is entitled to apply for a reconsideration, including a hearing, and does not do so, . . . even when the agency on reconsideration might reach a favorable decision which would make a determination of the constitutional question unnecessary³¹

In sum, while the result in *Evans* seems sound, it is to be hoped that in an appropriate case, specifically, one involving impending significant irreparable medical harm to the plaintiff, each of the numerous considerations recognized in *Evans*³² militating against waiving exhaustion, including the presence of unresolved factual issues, will be seen to be outweighed.

5. *State Participation in Medicaid and Preventive Health Care for Children.*—*Bond v. Stanton*³³ involved a class action civil rights suit contending that Indiana failed to implement an appropriate preventive health care program for children as required³⁴ of all states participating in the Medicaid program. On appeal, the plaintiffs maintained, and the Seventh Circuit held, that Indiana's Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program did not minimally specify what particular tests were required, that Indiana had not identified those Medicaid providers willing and able to perform EPSDT tests, and that the state had not monitored the tests given or required appropriate diagnosis and follow up treatment of examinees.³⁵

²⁹Most notably, to *Wilson v. Board of Ind. Employment Sec. Div.*, 385 N.E.2d 438 (Ind.), cert. denied, 444 U.S. 874 (1979).

³⁰424 U.S. 319 (1976).

³¹K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.16, at 292-93 (Supp. 1982). See also *Carter v. Stanton*, 405 U.S. 669 (1972) (per curiam) (Indiana welfare regulation case brought in federal court as a section 1983 action; administrative exhaustion not required).

³²419 N.E.2d at 255 (quoting *Indiana Dep't of Welfare v. Stagner*, 410 N.E.2d 1348, 1351 (Ind. Ct. App. 1980)).

³³655 F.2d 766 (7th Cir. 1981).

³⁴42 U.S.C. § 1396d(a)(4)(B) (1976).

³⁵655 F.2d at 769.

The court reasoned that “[w]ithout a thorough screening, including for example appropriate laboratory tests and a nutritional assessment, two diseases known to be among the leading health problems of poor children—malnutrition and lead poisoning—may well go undetected or unprevented.”³⁶ This analysis compares quite favorably with that of the court in *Wisconsin Welfare Rights Organization v. Newgent*.³⁷ In *Newgent*, the court correctly noted that the regulatory authority for requiring the extensive testing approved of in *Bond* was of a non-binding interpretive rule character,³⁸ but the *Newgent* court departed from the spirit of *Bond* in finding that evidence that only 1.5 percent of those examined had received a sickle cell test, or that only 9.3 percent had received a lead poisoning test, did not indicate, without other evidence, a lack of aggressive EPSDT implementation in Wisconsin.³⁹ Thus, the court in *Bond* was more aggressive than the *Newgent* court with respect to monitoring the administration of the EPSDT program.⁴⁰

B. Uncompensated Hill-Burton Costs as Reimbursable Medicare Costs

In *Johnson County Memorial Hospital v. Schweiker*,⁴¹ the plaintiffs were fifty-one Indiana hospitals that had participated both in the federal Medicare program and in the Hill-Burton Act grant program. Under the latter program, grants for hospital construction or improvement are tied to providing a certain measure of free hospital care not reimbursed under Hill-Burton.⁴² Judge Dillin determined that the policy aim of having the costs of treating Medicare beneficiaries borne by the Medicare program and of having Medicare not bear the costs of serving non-Medicare patients was served by interpreting the Hill-Burton free care costs as an imposed legal duty of the hospitals and a proportionately reimbursable indirect cost under the Medicare program.⁴³ “The Medicare patients benefit from the improved physical plant which results from Hill-Burton grants as they benefit from other . . . ‘necessary and proper costs’ such as heating and lighting.”⁴⁴ The cost

³⁶*Id.*

³⁷433 F. Supp. 204 (E.D. Wis. 1977) (decided, however, on plaintiff's motion for summary judgment for declaratory and injunctive relief).

³⁸*Id.* at 213. See also *Smith v. Miller*, 665 F.2d 172, 179 n.7 (7th Cir. 1981).

³⁹433 F. Supp. at 214-15.

⁴⁰Compare 655 F.2d at 770 with 433 F. Supp. at 211-12, 215. See also Rosenbaum, *The Medicaid Early and Periodic Screening Diagnosis and Treatment Program: HEW's New Regulations*, 13 CLEARINGHOUSE REV. 742, 742 (1980) (discussing the need for aggressive EPSDT implementation).

⁴¹527 F. Supp. 1134 (S.D. Ind. 1981).

⁴²42 U.S.C. § 291 (1976 & Supp. IV 1980).

⁴³527 F. Supp. at 1139.

⁴⁴*Id.* (citing 42 C.F.R. § 405.451(b)(2) (1980)).

of the free care obligation was found to be so similar to interest payments on building loans that not to classify such free care cost along with the expressly reimbursable interest on borrowed funds would be arbitrary and capricious.⁴⁵ Finally, the cost of free care was found not to be excluded from reimbursement as charity because the free care obligation was legally enforceable.⁴⁶

Roughly one month after the decision in *Johnson County Memorial Hospital* was issued, the District Court for the Northern District of Illinois reached a contrary result in *Saint Mary of Nazareth Hospital Center v. Department of HHS*.⁴⁷ The court in *Saint Mary of Nazareth Hospital Center* saw the free care costs as excluded charity⁴⁸ and found the connection between Hill-Burton construction or modernization and Medicare recipients, in particular, as too attenuated to qualify for reimbursement.⁴⁹ The court concluded that "it would be illogical" and in the nature of double-dipping "to obligate hospitals to provide a certain amount of free health care to indigents as compensation for receiving federal funds and then reimburse the hospital, again with federal funds, for the obligation incurred through the initial receipt of federal monies."⁵⁰

This latter contention was recently addressed in *Metropolitan Medical Center v. Harris*.⁵¹ Looking to the legislative history of the Hill-Burton Act, the District Court of Minnesota found "no evidence of any intent to require a hospital to pay for rendering the free care, only that the facilities be made available to all people,"⁵² without regard to the hospitalized person's financial position. By itself, however, this policy would not dictate that the participating hospital be technically overcompensated for such free care provision.

C. Tightening of Welfare Benefit Standards

The persistent theme of the impingement of practical budgetary constraints on questions of statutory and regulatory interpretation was manifested in *Foster v. Center Township*.⁵³ On cross motions for summary judgment, the court in *Foster* found that while a federal

⁴⁵27 F. Supp. at 1140. Characterizing a failure to classify free care costs with interest payments as "contrary to law" would technically seem a more suitable ground for reversal; it is hardly arbitrary to distinguish the two.

⁴⁶*Id.*

⁴⁷531 F. Supp. 419 (N.D. Ill. 1982).

⁴⁸*Id.* at 422. *Contra St. James Hosp. v. Harris*, 535 F. Supp. 751 (N.D. Ill. 1981).

⁴⁹531 F. Supp. at 421.

⁵⁰*Id.* at 422.

⁵¹524 F. Supp. 630 (D. Minn. 1981).

⁵²*Id.* at 633. See also *Iredell Memorial Hosp. v. Schweiker*, 535 F. Supp. 795, 799 (W.D.N.C. 1982).

⁵³527 F. Supp. 377 (N.D. Ind.), *aff'd mem.*, 673 F.2d 1334 (7th Cir. 1981).

statute⁵⁴ prevents a state from lowering its guaranteed income level for welfare recipients to take food stamps into account, it is permissible for a state to lower its guaranteed level for other reasons, such as to prevent the insolvency of its welfare benefit system.⁵⁵ Because a genuine issue of material fact remained as to Center Township's reason for decreasing the guaranteed income level, the court held that summary judgment was inappropriate.⁵⁶

Authority is available to support the court's determination that congressional intent "was to guarantee that food stamps would be available not in substitution for, but in addition to, any welfare payments already provided by states."⁵⁷ The crucial practical problem appears to be the evidentiary one of distinguishing a proscribed indirect linkage of benefit levels to food stamp availability from reduction of or failure to increase benefit levels because of perceived budget constraints. To a certain extent, these two justifications may not even be conceptually distinct.

In *Stanton v. Smith*,⁵⁸ the action of the Indiana State Welfare Board in ratably reducing, by twenty-five percent, the financial standards measure used to determine minimum essential needs for Aid to Families With Dependent Children (AFDC) recipients was challenged on the typically unavailing grounds of improper legislative delegation. The legislature had specified simply that such reduction was to be carried out and could not exceed thirty-five percent.⁵⁹ The Welfare Board, thereupon, held hearings to select a suitable reduction percentage. The Attorney General and the Governor were privy to the hearings and, with the Department of HEW, approved the Welfare Board's twenty-five percent reduction figure.⁶⁰ The supreme court held that the delegation was not improper in view of the existence of legislative standards designed to guide the exercise of the Welfare Board's discretion.⁶¹

It is clear that one of the Welfare Board's guidelines was the state's statutory obligation "to provide minimum standards of assistance which would provide reasonable subsistence to the most

⁵⁴7 U.S.C. § 2017(b) (Supp. IV 1980).

⁵⁵27 F. Supp. at 379.

⁵⁶*Id.*

⁵⁷*Id.* See, e.g., *Dupler v. City of Portland*, 421 F. Supp. 1314 (D. Me. 1976). For a discussion of some of the tenth amendment issues inherent in this type of statute, see *State v. Schweiker*, 655 F.2d 401, 411-14 (D.C. Cir. 1981).

⁵⁸429 N.E.2d 224 (Ind. 1981). For further discussion of this case, see *Smith, Administrative Law, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 1, 22 (1983).

⁵⁹429 N.E.2d at 225.

⁶⁰*Id.* at 228.

⁶¹*Id.*

needy children.”⁶² What is not indicated by the opinion is how the selected reduction figure relates to this standard, or more generally, how this figure relates to any policy or evidentiary basis for choosing the twenty-five percent reduction as opposed to any other particular figure between zero and thirty-five. While the reasoning process of the Welfare Board was not called into question on review, it does not seem appropriate to conclude, as the supreme court did, that “the action taken [by the Welfare Board] was subject to sufficient input and control to prevent arbitrary action.”⁶³ Arbitrariness is most directly controllable through a required statement of reasons or grounds for the administrative rule promulgated, rather than through official participation.⁶⁴

D. Local Welfare Assistance

The legal relationship between the township trustee and the county board of commissioners was at issue in *Perry Township v. Hedrick*.⁶⁵ In *Hedrick*, the court of appeals affirmed the trial court’s grant of a writ of mandamus to compel the trustee to comply with the board of commissioners’ order to pay the plaintiff’s delinquent utility bill.⁶⁶ The commissioners had reversed the trustee’s initial denial of assistance to the plaintiff, Hedrick, and the court of appeals held that from that point, “the trustee was under a clear legal duty to comply with the order by performing the ministerial act of paying Hedrick’s delinquent electric bill.”⁶⁷ The court noted that “[n]o provision in the general assistance statute is made for the trustee to appeal the Commissioners’ decision.”⁶⁸

⁶²*Id.*

⁶³*Id.*

⁶⁴See generally 5 U.S.C. § 553(c) (1976); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6:12 (1978 & Supp. 1980). Indiana statutory provisions on Welfare Board administrative rulemaking impose no comparable “statement of purpose” requirement. See IND. CODE §§ 4-22-2-4, -5 (1982); IND. CODE §§ 12-1-2-2, -3 (1982). But see Greenberg, *Administrative Law, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 65, 68-69 (1981). The value of a statement of reasons requirement even in the absence of statutory mandate is extolled in *Tri-State Generation and Transmission Ass’n v. Environmental Quality Council*, 590 P.2d 1324, 1330-31 (Wyo. 1979), and a statutory mandate itself is endorsed in the 1981 MODEL STATE ADMIN. PROCEDURE ACT § 3-110, 14 U.L.A. 66 (Supp. 1982).

⁶⁵429 N.E.2d 313 (Ind. Ct. App. 1981).

⁶⁶*Id.* at 318.

⁶⁷*Id.* at 317. See Rosenberg, *Overseeing the Poor: A Legal-Administrative Analysis of the Indiana Township Assistance System*, 6 IND. L. REV. 385, 393 (1973).

⁶⁸429 N.E.2d at 317. A somewhat similar issue was determined in accord with the *Hedrick* result in *Smythe v. Lavine*, 76 Misc. 2d 751, 351 N.Y.S.2d 568 (Sup. Ct. 1974) (county social service commissioner not empowered to seek judicial review of immediate supervisor’s aid determination). In *Attorney General v. Board of Pub. Welfare*,

The lack of symmetry between the individual claimant's right to appeal⁶⁹ and that of the trustee should not be disturbing, especially in view of the trustee's ability to make subsequent eligibility determinations with respect to the claimant.⁷⁰ If the Indiana statutory characterization of the trustee as the "overseer of the poor"⁷¹ is to be meaningful in this context, it must imply a diminished sense of legal adversariness on the part of the trustee.⁷² The smooth functioning of county government also weighs in this direction, and the burden of administrative and judicial appellate delay on potential welfare recipients⁷³ is obviously substantial.⁷⁴

E. Social Security Disability Claims

The manipulability and occasional harshness of substantial evidence review were successively manifested in two significant disability benefit decisions handed down by the Seventh Circuit.

In *Cassiday v. Schweiker*,⁷⁵ the Court of Appeals for the Seventh Circuit reversed a denial of Social Security disability benefits by Chief Judge Eschbach of the Northern District of Indiana.⁷⁶ The case

328 Mass. 446, 104 N.E.2d 496 (1952), mandamus was held to lie to compel a local board of public welfare to make payments in accordance with a determination by the state department of public welfare.

⁶⁹See IND. CODE § 12-2-1-18 (1982). Appeal of general assistance aid denials in Indiana is discussed in Note, *General Assistance Programs: Review and Remedy of Administrative Actions in Indiana*, 47 IND. L.J. 393 (1972).

⁷⁰See IND. CODE § 12-2-1-6.3 (1982).

⁷¹*Id.* § 12-2-1-18.

⁷²It might be said that the trustee owes a divided quasi-fiduciary duty to both current claimants and to future claimants, with the latter embodying the value of the integrity of funding. In an analogous setting, the Secretary is not afforded an appeal of administrative decisions in favor of Social Security Supplementary Security Income claimants beyond that provided for in 20 C.F.R. § 416.1455 (1981).

⁷³See *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (discussing termination, as opposed to the initial granting, of benefits).

⁷⁴While *Hedrick* was the most significant state welfare system case decided on appeal during the past survey period, several cases merit at least brief mention. In *Vanderburgh County Dep't of Pub. Welfare v. Prindle*, 419 N.E.2d 239 (Ind. Ct. App. 1981), the court of appeals located the responsibility for medical and hospital care of Indiana resident indigents injured out of state but treated in state with the county of the indigent's residence. This result has not been changed by the repeal of the statute involved nor by enactment, effective January 1, 1982, of the new governing statute, IND. CODE §§ 12-5-6-1 to -11 (1982). The problem in *Trustees of Indiana Univ. v. County Dep't of Pub. Welfare*, 426 N.E.2d 74 (Ind. Ct. App. 1981) of eligibility standards for hospital assistance is now resolved by section 12-5-6-2(c) of the Indiana Code and by regulations promulgated thereunder. See 470 IND. ADMIN. CODE § 11-1-1 (Supp. 1982).

⁷⁵663 F.2d 745 (7th Cir. 1981).

⁷⁶Chief Judge Eschbach joined the Seventh Circuit on December 12, 1981, some five weeks after the Seventh Circuit's decision in *Cassiday*.

developed from a decision by Indiana Rehabilitation Services⁷⁷ to discontinue Mrs. Cassiday's benefits on the grounds that her symptoms⁷⁸ no longer prevented her from engaging in substantial gainful employment.⁷⁹

On appeal, the Seventh Circuit conceded the difficulty in evaluating the claim in question but found the Administrative Law Judge's (ALJ) approach to the evidence to be "highly selective"⁸⁰ and arbitrary, not in any particular instance, but in cumulative effect.⁸¹ Neither the decision to terminate benefits nor the ALJ's determination that the claimant had willfully refused prescribed treatment was found to be based on substantial evidence in the record.⁸²

Substantial evidence in the record, as a whole, has been classically described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"⁸³ or as "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."⁸⁴ In this case, nine physicians⁸⁵ either treated, examined, or reviewed the claimant or her medical records during the relevant period. The treating physicians apparently tended to view the claimant's condition as more severely disabling than the majority of the examining physicians or the evenly split reviewing physicians. The Seventh Circuit was willing to "direct a verdict," despite this obvious equivocality, in view of case law according the opinion of a treating physician

⁷⁷In accordance with the national pattern, Indiana Rehabilitation Services acts under contract with the Social Security Administration. 663 F.2d at 746.

⁷⁸*Id.* (the symptoms included "pain, numbness, tingling, and weakness in her arms and hands" and chest pain, brought on by occlusion of blood vessels and nerve root compression).

⁷⁹*Id.* See 42 U.S.C. § 423 (1976 & Supp. IV 1980); 20 C.F.R. §§ 404.1501 to -.1574 & app. 2 (1981).

⁸⁰663 F.2d at 749.

⁸¹*Id.* at 748.

⁸²*Id.* at 750.

⁸³Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938), quoted in NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939). See also Richardson v. Perales, 402 U.S. 389, 401 (1971); Universal Camera Corp. v. NLRB, 340 U.S. 474, 477-87 (1951).

⁸⁴NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939).

⁸⁵Inefficient over-utilization of expensive physician time in the disability adjudication process is common. See Richardson v. Perales, 402 U.S. 389 (1971) (six examining physicians and one reviewing physician relied upon); Oldham v. Schweiker, 660 F.2d 1078 (5th Cir. 1981) (eight examining physicians and one examining psychologist involved); Anderson v. Schweiker, 651 F.2d 306 (5th Cir. 1981) (ten examining physicians involved); Roy v. Secretary of HHS, 512 F. Supp. 1245 (C.D. Ill. 1981) (six examining physicians); Schlabach v. Secretary of HEW, 469 F. Supp. 304 (N.D. Ind. 1978) (six physicians involved).

greater weight than that of a physician who has examined the claimant only once.⁸⁶

Ideally, this case would have been remanded for vocational expert testimony. What should be sought from physicians is their opinion as to a claimant's physical or medical condition, not whether the claimant falls into the legal category of "disabled," or even whether the claimant's relationship to the relevant job market is such that she is capable of "sedentary light work" or "light sedentary work."⁸⁷ Each of the latter quoted expressions is legally meaningless under the applicable disability regulations.⁸⁸

The Seventh Circuit also found insufficient evidence to sustain the ALJ's determination that the claimant's case fell under the regulation barring disability status to one who willfully refuses prescribed treatment.⁸⁹ The appellate court declared its willingness to hang the weight of a disability determination on the distinction between a physician's "prescribing" surgery—an unidiomatic usage in itself—and "recommending" surgery. The claimant's reasons for declining treatment may be frivolous or amount to sheer opportunism as long as the latter characterization, and not the former, is applied to the physician's remedy.

In the second disability benefits case, Judge Posner of the Seventh Circuit applied the substantial evidence standard far more deferentially. In *Cummins v. Schweiker*,⁹⁰ the court of appeals upheld the denial of disability benefits by the District Court for the Northern District of Indiana, relying in part on the controversial new medical-vocational guidelines or grid regulations.⁹¹

⁸⁶See *Allen v. Weinberger*, 552 F.2d 781, 786 (7th Cir. 1977). Cf. *Cummins v. Schweiker*, 670 F.2d 81, 84 (7th Cir. 1982) (refusing to accord decisive weight to the opinion of a long-time family physician).

⁸⁷663 F.2d at 747. Increased use of vocational expert testimony would also mitigate any perceived battles between government-employed physicians and sympathetic family physicians. Compare *Cummins v. Schweiker*, 670 F.2d 81, 84 (7th Cir. 1982) with *Richardson v. Perales*, 402 U.S. 389, 414 (1971) (Douglas, J., dissenting).

⁸⁸See 20 C.F.R. § 404.1567 (1981).

⁸⁹See *id.* § 404.1518 (1980).

⁹⁰670 F.2d 81 (7th Cir. 1982).

⁹¹20 C.F.R. §§ 404.1501 to -1569 & app. 2 (1981). Under these regulations, a severely impaired claimant prevented from doing his past work and not currently doing significant work is categorized based on the level of work exertion he is capable of, his age, education, and nature of work experience, and the transferability of any acquired job skills to other job settings. The individual findings are then simply programmed into the appropriate Appendix 2 Grid. Nonexertional limitations aside, if the precise combination of findings in a given case is explicitly provided for in one of the grids, the claimant is determined by the grid to be disabled or not disabled. Administrative notice has been taken in the rules themselves of the number of unskilled jobs at various exertional levels that exist throughout the national economy. 20 C.F.R. app. 2 § 200.00 (1981); *Decker v. Harris*, 647 F.2d 291, 297 (2d Cir. 1981). The regulations discuss the

The claimant in *Cummins* was forty-nine years old, of limited education, arthritic in his knees and right shoulder, mildly weakened in his right side due to an automobile accident, and had suffered, outside the record on appeal, a recent heart attack. A potentially significant nonexertional limitation was his blindness in one eye. By implication, the claimant would have been found disabled had he been fifty years old, had unimpaired binocular vision, and suffered no heart attack.

While Judge Posner recognized in *Cummins* that the statutory criteria for disability are quite strict and that disability is not synonymous with unemployment or even unemployability,⁹² the *Cummins* decision left uncertain the status of other undiscussed, recent Seventh Circuit cases of a more liberal bent. Where Judge Posner writes of the claimant in *Cummins* that “[p]ossibly his prospects of obtaining substantial gainful employment of any kind . . . have never been more than theoretical,”⁹³ the Seventh Circuit has previously held that “[t]he mere theoretical ability to engage in substantial, gainful activity is insufficient to defeat an applicant’s claim for disability benefits.”⁹⁴

Judge Posner’s opinion upholds the grid regulations⁹⁵ against a challenge to the effect that the regulations attempt, contrary to statute, to dispense with the need for evidence of the existence, in substantial numbers, of suitable jobs. The difficulty inherent in cross-examining a grid as to whether particular unspecified sorts of jobs are genuinely suitable for the claimant has rendered the grid regulations controversial,⁹⁶ despite their laudable aim of streamlining the

claimant’s right to rebuttal only in the context of the various factual determinations programmed into the grid, and not in the context of linking specific existing job types with the claimant’s capacities. 20 C.F.R. app. 2 § 200.00 (1981); *Geoffroy v. Secretary of HHS*, 663 F.2d 315, 318 (1st Cir. 1981).

⁹²See 20 C.F.R. § 404.1566(c) (1981).

⁹³670 F.2d at 84.

⁹⁴*Smith v. Secretary of HEW*, 587 F.2d 857, 861 (7th Cir. 1978) (per curiam). See also *Stark v. Weinberger*, 497 F.2d 1092 (7th Cir. 1974); *Schlabauch v. Secretary of HEW*, 469 F. Supp. 304, 316 (N.D. Ind. 1978) (focusing on the unrealism of supposing that an employer would actually hire anyone with the impairments of the claimant).

⁹⁵670 F.2d at 83-84. See *supra* note 91 and accompanying text.

⁹⁶See, e.g., *Chapman v. Schweiker*, No. 81-1025 (10th Cir. Feb. 26, 1982) (available June 28, 1982, on LEXIS, Genfed library, Newer file); *Kirk v. Secretary of HHS*, 667 F.2d 524 (6th Cir. 1981) (upholding the regulations against several statutory and constitutional objections); *Salinas v. Schweiker*, 662 F.2d 345, 349 (5th Cir. 1981) (allowing the use of administrative notice of jobs which claimant could perform in lieu of calling a vocational expert to testify) (citing *Fraday v. Harris*, 646 F.2d 143, 144-45 (4th Cir. 1981)). But see *Davis v. Schweiker*, 536 F. Supp. 90 (N.D. Cal. 1982); *Santise v. Harris*, 501 F. Supp. 274, 277 (D.N.J. 1980) (discussed in *Cummins*), *rev’d sub nom. Santise v. Schweiker*, 676 F.2d 925, 935 (3d Cir. 1982) (favorably citing Judge Posner’s opinion in *Cummins*). See also *Desedare v. Secretary of HEW*, 534 F. Supp. 21 (W.D. Ark.

disability adjudication process and increasing the uniformity of result.⁹⁷

F. Statutory Developments

In addition to the legislative enactments mentioned in connection with particular cases above, the past survey period was marked by numerous potentially significant statutory developments.

The legislature, in one enactment, defined Community Action Agencies and community action programs aimed at poverty reduction.⁹⁸ The legislature charged such agencies to be broadly representative in composition and emphasized utilizing private sector resources in closing social service gaps, coordinating the variety of social service programs available, and focusing available resources on the most needy persons.⁹⁹

Similarly, the legislature established a department on aging and community services and a state commission on the aging and the aged thereunder.¹⁰⁰ The legislative emphasis is on service coordination and research, as well as advocacy, in areas such as health and nutrition, transportation, and housing and employment counseling. Also, the role of senior volunteer programs and the value of participation by the aged in community life is noted.¹⁰¹

Attorneys will note the absence, in the statute, of any explicit recognition of the need of older citizens for the provision of legal services.¹⁰² In this area, as in others, the availability and stability of

1981); *Stewart v. Harris*, 508 F. Supp. 345 (D.N.J. 1981). Probably the most trenchant criticism of the regulations relied upon in *Cummins* is to be found in *Campbell v. Secretary of HHS*, 665 F.2d 48, 53-54 (2d Cir. 1981); *Decker v. Harris*, 647 F.2d 291, 298-99 (2d Cir. 1981); and *Fisher v. Schweiker*, 514 F. Supp. 119, 121 (W.D. Mo. 1981). In turn, *Decker* has been criticized in *Torres v. Secretary of HHS*, 677 F.2d 167, 169 (1st Cir. 1982). The most recent case on point is *Broz v. Schweiker*, 677 F.2d 1351, 1360 (11th Cir. 1982) (striking down the grid's conclusive determination that persons age 49 are able to adjust to new unskilled sedentary work as improperly ignoring the distinction between legislative and adjudicative facts).

⁹⁷See 670 F.2d at 83.

⁹⁸IND. CODE §§ 12-1-21-1 to -9 (1982).

⁹⁹*Id.*

¹⁰⁰*Id.* §§ 4-27-1-1 to -4-3.

¹⁰¹*Id.* § 4-27-3-1. The State of California provides an interesting contrast in more explicitly recognizing the role of older citizens as a collective social resource. "Older persons constitute a fundamental resource of the state which previously has been undervalued and poorly utilized, and . . . ways must be found to enable older people to apply their competence, wisdom, and experience for the benefit of all . . ." CAL. WELF. & INST. CODE § 9001(a) (West Supp. 1982). California thus approaches an explicit distinction between older citizens as a productive community resource and older citizens as social service consumers. It is arguable that the retired person seeking part-time paid employment has less of an immediate community of interest with the chronically impaired aged than with the active workforce.

¹⁰²In contrast, see CAL. WELF. & INST. CODE § 9002(f)(8) (West Supp. 1982).

state funding is of perhaps greater concern than coordination and efficient utilization of programs, and Indiana has declined to follow emulable models in this respect.¹⁰³

In a related welfare area, an Indiana rehabilitation services agency was established to receive gifts and bequests, to initiate and operate programs related to the vocational rehabilitation of blind, visually impaired, and handicapped persons, and to operate, with federal government approval, a disability determination division for the purpose of adjudicating disability insurance and supplemental security income claims under Social Security.¹⁰⁴

Under another act,¹⁰⁵ "health facilities" was defined¹⁰⁶ and an Indiana health facilities council established, with the latter being empowered to adopt rules to protect patient health, safety, rights, and welfare, along with the authority to conduct unannounced inspections¹⁰⁷ of health care facilities and to recommend to the State Board of Health with respect to the issuance and revocation of licenses. Provision is made for investigation and confidentiality of complaints, and for imposition of appropriate sanctions for rule violations. The most serious and unmitigated violations may result, after June 30, 1983, in the state health commissioner's ordering immediate corrective action and imposing a fine of up to \$10,000,¹⁰⁸ along with license revocation by the health facilities council on the commissioner's recommendation.

Also, a nursing home prescreening program was established¹⁰⁹ that generally requires prior screening and approval for placement in a nursing home by a multidisciplinary screening team "if the person is currently or will within two (2) years be financially eligible for assistance under the Federal Medicaid Program . . . for the payment of any part of the cost of care provided in a health facility."¹¹⁰ The

¹⁰³See, e.g., N.Y. EXEC. LAW §§ 536-a4(b), 541 (McKinney 1972 & Supp. 1972-1981) (providing for at least partial or limited state reimbursement of approved local expenditures for community services to the elderly).

¹⁰⁴IND. CODE §§ 16-7-17-1 to -15 (1982).

¹⁰⁵*Id.* §§ 16-10-4-1 to -29.

¹⁰⁶*Id.* § 16-10-4-2(a). Significant exclusions are made with respect to the scope of "health facility." See *id.* § 16-10-4-2(b).

¹⁰⁷*Id.* § 16-10-4-7(b). For an excellent discussion of the fourth amendment constitutionality of unannounced warrantless inspections of health care facilities limited by statute to reasonable times, see *People v. Firstenberg*, 92 Cal. App. 3d 570, 155 Cal. Rptr. 80 (1979), cert. denied, 444 U.S. 1012 (1980).

¹⁰⁸IND. CODE § 16-10-4-15(c)(1)(A) (1982). For a thorough discussion of several issues involved in the imposition of substantial civil fines by administrative agencies, see *Lloyd A. Fry Roofing Co. v. Pollution Control Bd.*, 46 Ill. App. 3d 412, 361 N.E.2d 23 (1977).

¹⁰⁹IND. CODE §§ 12-1-22-1 to -6 (1982).

¹¹⁰*Id.* § 12-1-22-2(a). Cf. ARIZ. REV. STAT. ANN. § 11-293 (Supp. 1981) (conditioning eligibility for nursing home placement on preadmission screening of the individual indigent).

screening process involves an assessment of whether placement in a nursing home is appropriate in light of the applicant's medical needs and the availability and cost-effectiveness of alternatives to nursing home care. Nonparticipation by the applicant in the preadmission screening program bars the person's eligibility for Medicaid assistance in connection with services provided by the nursing home for two years after admission.¹¹¹

Finally, the legislature established a State Medicaid Fraud Control Unit¹¹² under applicable federal statutory authority.¹¹³ Provision is made for the referral of unresolved cases of suspected overpayments or improper payments to Medicaid providers to the Medicaid Fraud Control Unit, which may in turn refer the matter to the appropriate prosecutor.¹¹⁴

¹¹¹This provision is probably defensible against an equal protection or due process challenge in light of the federal statutory mandate of 42 U.S.C. § 1396(a)(26)(A) (Supp. IV 1980) and the "broad discretion" conferred on the states in adopting standards with respect to eligibility for Medicaid assistance. *See Beal v. Doe*, 432 U.S. 438, 444 (1977). *See also Blum v. Yaretsky*, 102 S. Ct. 2777 (1982). The Medicaid "freedom of choice" policy of section 1396(a)(23) would not seem to be literally implicated, though conscientious, religiously based objections to the preadmission screening would raise constitutional questions.

¹¹²IND. CODE §§ 4-6-10-1 to -2 (1982).

¹¹³42 U.S.C. § 1396b(q) (Supp. IV 1980). For a discussion of the Federal Medicare-Medicaid Anti-Fraud and Abuse Amendments, see H. McCORMICK, MEDICARE AND MEDICAID CLAIMS AND PROCEDURES 9-15 (Supp. 1981).

¹¹⁴IND. CODE §§ 12-1-7-15.8 to -15.9 (1982).

XVI. Taxation

JOHN W. BOYD*

A. Introduction

While the 1981-82 survey period brought radical changes and significant developments in the area of federal tax law through, most significantly, the enactment of the Economic Recovery Tax Act of 1981 (ERTA),¹ the same cannot be said with respect to case and statutory developments in the area of Indiana tax law. Nevertheless, there are several case and statutory developments which occurred during this period that are worthy of comment not only for the purpose of isolating their independent significance to particular areas of Indiana tax law, but also for the purpose of tracing the trends in the overall development of Indiana tax law.

Insofar as the judicial developments in the area of Indiana tax law are concerned, this author would agree with the comment made in last year's Survey² with respect to the significant case of *Indiana Department of Revenue v. Kimberly-Clark Corp.*³ that "common sense is still the prevailing yardstick in Indiana for measuring state tax liability."⁴ This is evidenced by the approach that the Indiana Supreme Court and the Indiana Court of Appeals have taken in most of the cases discussed in this Survey.⁵ Although that is generally the case, the area of taxation, being a code as opposed to a common law discipline, often turns on technical aspects. The importance of the technician is highlighted in certain cases handed down during the survey period.⁶

Insofar as the statutory area is concerned, there are likewise specific statutory developments and general statutory trends which are worthy of comment. Certain of these specific statutory

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¹Pub. L. No. 97-34, 95 Stat. 172 (1981). Discussion of the Economic Recovery Tax Act of 1981 (ERTA) is, of course, beyond the scope of this Article. ERTA was, however, the basis for many of the more significant legislative developments of the Survey Period. See *infra* text accompanying notes 93-123.

²King, *Taxation, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 409 (1982).

³416 N.E.2d 1264 (Ind. 1981).

⁴King, *supra* note 2, at 409.

⁵See, e.g., Park 100 Dev. Co. v. Indiana Dep't of State Revenue, 429 N.E.2d 220 (Ind. 1981). This case is discussed later in this Article. See *infra* text accompanying notes 69-72.

⁶See, e.g., Indiana Dep't of Revenue v. United States Steel Corp., 425 N.E.2d 659 (Ind. Ct. App. 1981). One highlight of this case is the importance the court placed upon segregating accounts to track and support sales and use tax exemptions.

developments will be discussed in some detail, while other statutory developments of a specialized nature will merely be noted. The 1982 General Assembly did continue the process of recodifying the various acts in Title 6 of the Indiana Code by enacting Public Law 59 which is a recodification of the Indiana Motor Carrier Fuel Tax.⁷ Of more general significance, however, was the Indiana Legislature's selective acceptance of portions of ERTA in its traditional updating of the Internal Revenue Code references in Title 6.⁸

Also to be noted is the increased volume of administrative rulings⁹ issued by the Indiana Department of State Revenue (Revenue Department) during the past survey period. The increased number of rulings has been helpful to the practitioner planning transactions and evaluating controversies, because they provide an ever-growing body of authority from which to draw when evaluating a particular set of circumstances. As an adjunct to noting the rulings activity of the Revenue Department, the efforts of the Revenue Department to update regulations and to issue explanatory releases or guidelines should also be noted. While these administrative activities have been beneficial to the practitioner by providing a published basis for determining the view of the Revenue Department as to a particular issue, they also provide a basis for litigation.¹⁰

B. Sales and Use Tax Decisions

The "double direct" language of the sales and use tax exemption for transactions involving machinery, tools, and equipment used for manufacturing¹¹ has lead to substantial litigation over what qualifies for the exemption. The statutory language restricts the application of the exemption to manufacturing equipment which is *directly* used or consumed by the purchaser in the *direct* production of tangible personal property. The judicial decisions dealing with what types of manufacturing equipment may be considered to be directly used in direct production appear to be irreconcilable from a doctrinal

⁷Act of Feb. 24, 1982, Pub. L. No. 59, 1982 Ind. Acts 523 (1982). In recent years past, the Gross Income Tax, Sales and Use Tax, Motor Fuel, and Special Fuel Tax Acts have been recodified, and the administrative provisions of the various tax acts have been incorporated into an "administrative code."

⁸Act of Feb. 25, 1982, Pub. L. No. 52, 1982 Ind. Acts 494 (1982).

⁹Such rulings are summarized and distributed to the public in quarterly "circulars" in accordance with Commissioner's Directive No. 3.

¹⁰See, e.g., Indiana Dep't of Revenue v. United States Steel Corp., 425 N.E.2d 659 (Ind. Ct. App. 1981) (the Revenue Department's Sales and Use Tax Regulations, 45 IND. ADMIN. CODE §§ 2-1-1 to -16-1 (1979), were called into question).

¹¹IND. CODE §§ 6-2.5-5-3 to -4 (1982) (previously codified at *id.* § 6-2-1-39(b)(6) and (10) (1976)).

perspective.¹² This irreconcilability may have been partially eliminated through the common sense gloss placed on the exemption by the court of appeals in *Indiana Department of Revenue v. United States Steel Corp.*¹³

At issue in that case was the application of the exemption to certain protective equipment, including safety eyeglasses, protective gloves, hardhats, shields, and protective clothing used by production workers at the taxpayer's steel production facilities. In upholding the trial court determination that the equipment was not only "essential and integral" to the production of steel but also was directly used in direct production,¹⁴ the court of appeals rejected the "positive effect" test proffered by the Revenue Department because it was "too vague and misleading to provide an effective and accurate guide for taxpayers."¹⁵

In support of its denial of the exemption for the safety equipment in question, the Revenue Department relied primarily on *Indiana Department of State Revenue v. Harrison Steel Castings Co.*¹⁶ In *Harrison*, the court of appeals denied the exemption for safety glasses used to protect workers' eyes from flying debris and for gloves used to protect workers' hands from rough castings, because this equipment did not have a "positive effect" on and direct causal relationship with the product.¹⁷ Although the court in *United States Steel* noted that the adoption of the Revenue Department's positive effect test in *Harrison* was "inconsistent with the careful analysis of earlier decisions,"¹⁸ the court did not overrule *Harrison*; rather, it stated that the two cases are factually distinguishable because the safety equipment in *Harrison* was for the protection of the workers and was not necessary for the creation of the product, while the safety equipment in *United States Steel* was "so highly specialized that creation of the product is impossible without it."¹⁹

Notwithstanding the basis of the foregoing distinction, *United States Steel* cannot be seen as establishing a simple sine qua non test for directness. The court in *United States Steel* continues to adhere to the directness test set forth in *Indiana Department of State Revenue*

¹²Compare *Indiana Dep't of Revenue v. Calcar Quarries, Inc.*, 394 N.E.2d 939 (Ind. Ct. App. 1979) with *Indiana Dep't of State Revenue v. Cave Stone, Inc.*, 409 N.E.2d 690 (Ind. Ct. App. 1980), reh'g denied, 427 N.E.2d 922 (1981).

¹³425 N.E.2d 659 (Ind. Ct. App. 1981).

¹⁴*Id.* at 661.

¹⁵*Id.* at 666.

¹⁶402 N.E.2d 1276 (Ind. Ct. App. 1980).

¹⁷*Id.* at 1278.

¹⁸425 N.E.2d at 664.

¹⁹*Id.*

v. *RCA Corp.*²⁰ That test requires the manufacturing equipment to have an "immediate link with the product being produced."²¹ According to the court in *United States Steel*, in order for equipment to have an immediate link with the product being produced, it must be "essential and integral" to the production of the product.²² This embellishment on the directness test furthers the common sense theme so familiar in recent decisions, and it removes some of the previously existing doctrinal uncertainty as to the appropriate analysis.

United States Steel also lends some clarification to the contradiction, noted in last year's Survey,²³ between the court's 1980 opinion in *Indiana Department of State Revenue v. Cave Stone, Inc.*²⁴ and its earlier decision in *Indiana Department of Revenue v. Calcar Quarries, Inc.*²⁵ *Calcar Quarries* rejected the Revenue Department's positive effect test; whereas, *Cave Stone* appeared to utilize the positive effect test in denying the exemption for transportation equipment used to haul graded stone from one step of the manufacturing process to another. The contradiction between these cases was reviewed in last year's Survey as follows:

[I]t is not clear whether in *Cave Stone* the court was really embracing the Revenue Department's direct use test and requiring that the machinery have a "positive effect" on the manufactured product or whether the court was simply concluding that the taxpayer was engaged in two separate exempt functions, quarrying and manufacturing. In the latter instance, transportation equipment which merely moved the stone from the quarry to the manufacturing operation was taxable because such equipment was not directly integral to either exempt function.²⁶

In addressing this issue, the court in *United States Steel* explained that *Cave Stone* should be interpreted as denying an exemption for equipment which merely transports the product between two exempt functions.²⁷

The *United States Steel* interpretation was confirmed when the court of appeals denied the petition for rehearing of *Cave Stone*²⁸ and

²⁰160 Ind. App. 55, 61, 310 N.E.2d 96, 100 (1974).

²¹*Id.*, quoted in *Indiana Dep't of Revenue v. United States Steel Corp.*, 425 N.E.2d 659, 662 (Ind. Ct. App. 1981).

²²425 N.E.2d at 664.

²³King, *supra* note 2, at 413-15.

²⁴409 N.E.2d 690 (Ind. Ct. App. 1980).

²⁵394 N.E.2d 939 (Ind. Ct. App. 1979).

²⁶King, *supra* note 2, at 413-14.

²⁷425 N.E.2d at 664.

²⁸*Indiana Dep't of State Revenue v. Cave Stone, Inc.*, 427 N.E.2d 922 (Ind. Ct. App. 1981).

stated that "manufacturing equipment must have a *transformational* effect as opposed to a *translational* effect for it to be exempt."²⁹ Thus, neither the quarried stone nor the crushed stone was considered to be undergoing processing, mining, or production during transportation. In the *Cave Stone* rehearing opinion, the court also stated that it disagreed with the *Calcar* holding to the extent that *Calcar* recognized an exemption which encompassed an overlapping of enumerated statutorily exempt functions.³⁰

Although the decision in *United States Steel* may not provide the definitive answer to the ambiguity created by the double direct language of the manufacturing exemption statute, it does represent a positive step towards a more realistic interpretation by eliminating the vacuous positive effect test and emphasizing a fact-sensitive analytical approach. The *Cave Stone* rehearing opinion also represents a step toward an understandable interpretation by requiring the analysis to focus on the actual production process.

C. Gross Income Tax Decisions

1. *Interstate Commerce Cases*.—During the survey period, the court of appeals was faced with three cases involving the applicability of the Indiana gross income tax to corporations involved in interstate commerce. Two of these cases, *Indiana Department of State Revenue v. Brown Boveri Corp.*³¹ and *Indiana Department of State Revenue v. General Foods Corp.*,³² were essentially mine run cases involving taxation of interstate commerce concepts, but the third case, *Reynolds Metals Co. v. Indiana Department of State Revenue*,³³ involved issues of a more novel nature.

In *Brown Boveri*, the interstate commerce in question involved a contract whereby the defendant, a foreign corporation, was to install an induction melting system in an Indianapolis foundry of a national corporation. The system in question was prefabricated at an out-of-state plant, broken down for shipment to Indiana and then reassembled at the purchaser's Indiana facility. In order to fulfill its obligation under the contract, the taxpayer was required to engage in various activities in Indiana, including removing obsolete equipment and foundations, trenching, and reassembling and reinforcing the new equipment. The part of this system for air pollution control was obtained from a third party and was to be installed by yet another party. Both the supplier and the installer of the pollution equipment were foreign corporations.

²⁹*Id.* at 924.

³⁰*Id.* at 923.

³¹429 N.E.2d 285 (Ind. Ct. App. 1981).

³²427 N.E.2d 665 (Ind. Ct. App. 1981).

³³433 N.E.2d 1 (Ind. Ct. App. 1982).

In asserting that the receipts from the contract were taxable as gross income, the Revenue Department argued that the performance of substantial installation activities within Indiana removed the transaction from the statutory interstate commerce exemption. In support of its argument, the Revenue Department relied on case law which holds that if activities taking place within this state are "more than minimal or incidental" to the overall contract, then such activities are sufficient to justify the imposition of state taxation.³⁴

Having little difficulty in rejecting those arguments, the court harkened back to the principle that the determining factor in deciding what activity constitutes interstate commerce that is insulated from state taxation is whether the in-state activities "are so intrinsically related to and inherently a part of the interstate sale that it is seen as one continuing transaction."³⁵ With the facts presented in *Brown Boveri*, the court had little problem in concluding that the taxpayer's activities within this state were intrinsically related to, and inherently a part of, the sale in interstate commerce.³⁶ Consequently, the receipts generated by the contract were held to be exempt from gross income taxation.³⁷

*Indiana Department of State Revenue v. General Foods Corp.*³⁸ involved an assessment of gross income tax on amounts received by a national food producing and wholesaling corporation from sales to Indiana customers. These sales were made through out-of-state sales facilities pursuant to orders accepted at out-of-state facilities and were shipped to Indiana customers from out-of-state distribution facilities. The basis of the Revenue Department's assertion that such receipts were taxable was that products of the same type were from time to time stored in Indiana warehouse facilities. It should be noted that the taxpayer did report and pay gross income tax on receipts from sales to Indiana customers generated by shipments from its Indiana warehouse facilities.³⁹ However, the Revenue Department contended that all of the taxpayer's products sold in Indiana which were of a type maintained in inventory in Indiana facilities were subject to the tax, regardless of whether the sales were generated by, and shipped from, out-of-state facilities.

³⁴429 N.E.2d at 287 (citing *Gross Income Tax Div. v. Surface Combustion Corp.*, 232 Ind. 100, 111 N.E.2d 50 (1953); *Gross Income Tax Div. v. Fort Pitt Bridge Works*, 227 Ind. 538, 86 N.E.2d 685 (1949)).

³⁵429 N.E.2d at 288. As authority for this principle, the court cited *Gross Income Tax Div. v. Surface Combustion Corp.*, 232 Ind. 100, 111 N.E.2d 50 (1953) and *Gross Income Tax Div. v. Fort Pitt Bridge Works*, 227 Ind. 538, 86 N.E.2d 685 (1949).

³⁶429 N.E.2d at 288.

³⁷*Id.*

³⁸427 N.E.2d 665 (Ind. Ct. App. 1981).

³⁹*Id.* at 667.

In effect, the Revenue Department in *General Foods Corp.* was attempting to assert that the presence of certain types of inventory within Indiana subjects all Indiana-destination sales of that type of inventory to gross income taxation, regardless of other factors which may exist with respect to those sales. Noting that the derivation of income must be attributable to *in-state* activities of the taxpayer in question as opposed to the source of the sales receipts, the court of appeals rejected the Revenue Department's contention and ruled that the gross income tax was inapplicable to the sales receipts in question.⁴⁰

In *Reynolds Metals Co. v. Indiana Department of State Revenue*,⁴¹ the taxpayer raised the issue of whether the statutory three-factor apportionment formula,⁴² used in determining business income derived from Indiana sources for *adjusted* gross income purposes, could be utilized for gross income tax purposes. By way of background, use of the apportionment formula was, as the court in *Reynolds* noted, "suggested for possible application in the gross income context in *Indiana Department of Revenue v. P.F. Goodrich Corp.*"⁴³ The court in *Reynolds* rejected the taxpayer's argument that *Goodrich* required the use of the three-factor apportionment formula "in lieu of identifying the actual income generated by business activity in this state."⁴⁴ Noting that *Goodrich* involved a one-instance transaction which was incapable of division into portions attributable to in-state and out-of-state business activity, the court in *Reynolds* held that the apportionment formula was not appropriate in this case, effectively limiting the application of apportionment in gross income tax to receipts inherently incapable of association with a particular taxing jurisdiction.⁴⁵

Instructive to taxpayers was the court's distilled analysis of the thrust of many of the significant cases regarding the taxation of interstate business activities. The court stated that:

⁴⁰*Id.* at 670.

⁴¹433 N.E.2d 1 (Ind. Ct. App. 1982).

⁴²IND. CODE § 6-3-2-2(b) (1982) provides as follows:

If the business income derived from sources within the state of Indiana of a corporation or nonresident person cannot be separated from the business income of such person or corporation derived from sources without the state of Indiana, then the business income derived from sources within this state shall be determined by multiplying the business income derived from sources both within and without the state of Indiana by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three (3).

Id.

⁴³433 N.E.2d at 5 (citing *Indiana Dep't of Revenue v. P.F. Goodrich Corp.*, 260 Ind. 41, 292 N.E.2d 247 (1973)).

⁴⁴433 N.E.2d at 7.

⁴⁵*Id.* at 8.

[A] corporation must segregate its accounts and keep sufficient records so that intrastate and interstate activities producing income can be sufficiently identified and interpreted to intelligently assess the interstate commerce exemption without resort to an arbitrary formula not provided in the Gross Income Tax statute of 1933. . . . Failure to identify and segregate its records will result in adverse tax consequences to the corporation.⁴⁶

Reynolds also involved several more mundane issues which arise in the interstate commerce area under the gross income tax. Discussing sales to Indiana customers that result from solicitations by the out-of-state sales personnel of a company which has Indiana-based sales personnel, some Indiana inventory in certain of its divisions, and certain Indiana plants, the court applied the standard "nexus" test⁴⁷ on a transactional basis and affirmed the generally accepted principles that the mere solicitation of orders within a state does not, in itself, form a sufficient nexus to support taxing jurisdiction over the receipts generated by the solicitation⁴⁸ and that legitimate "house accounts" may be exempt.⁴⁹ With respect to house accounts, however, *Reynolds* makes it clear that substantial in-state activities involving installation or assembly of a nonstandardized item may subject receipts from a house account to gross income taxation.⁵⁰ Additionally, *Reynolds* held that the maintenance of a security interest in consigned goods located in Indiana, standing alone, does not have sufficient nexus to support taxing jurisdiction over the secured party when the goods are ultimately sold by the consignee.⁵¹

2. *Taxpaying Entities.*—*Indiana Department of Revenue v. American Underwriters, Inc.*⁵² presented an issue of first impression in Indiana. In this case, the court of appeals addressed the issue of

⁴⁶*Id.* at 9.

⁴⁷This test, emanating from *General Motors Corp. v. Washington*, 377 U.S. 436 (1964), requires that a transaction or category thereof sought to be subject to state taxation must have a sufficient relationship with the taxing jurisdiction, vis-a-vis the party sought to be taxed, in order to support the imposition of taxation.

⁴⁸433 N.E.2d at 12-13 (discussing *Mueller Brass Co. v. Gross Income Tax Div.*, 255 Ind. 514, 538, 265 N.E.2d 704, 719 (1971); *Gross Income Tax Div. v. Owens-Corning Fiberglass Corp.*, 253 Ind. 102, 118, 251 N.E.2d 818, 827 (1969); 45 IND. ADMIN. CODE § 1-1-120(1)(b) (1979)).

⁴⁹433 N.E.2d at 14-15 (discussing *Mueller Brass Co. v. Gross Income Tax Div.*, 255 Ind. 514, 538, 265 N.E.2d 704, 719 (1971); *Gross Income Tax Div. v. Owens-Corning Fiberglass Corp.*, 253 Ind. 102, 118, 251 N.E.2d 818, 827 (1969); 45 IND. ADMIN. CODE § 1-1-120(1)(b) (1979)).

⁵⁰433 N.E.2d at 12-13.

⁵¹*Id.* at 17.

⁵²429 N.E.2d 306 (Ind. Ct. App. 1981).

whether an interinsurance exchange⁵³ and a corporation, organized solely to act as attorney-in-fact for the exchange, constitute a single taxable entity for state income tax purposes where the interests of the interinsurance exchange and the corporation are divergent and not coextensive.

American Underwriters (A-U), an Indiana corporation, was organized to act as attorney-in-fact for American Interinsurance Exchange (Exchange), a reciprocal insurance business which provided indemnity or risk-sharing among subscribing casualty insurers. The Exchange had no separate officers or organization, was not incorporated, had no articles of partnership, nor any other articles of agreement other than the subscribers' agreement which gave A-U the authority to manage the insurance business of the Exchange. Other than its attorney-in-fact, the Exchange had no agents or other persons or entities through which business was conducted. Policies were written by A-U in the name of the Exchange. The subscribers' agreement entitled A-U to a management fee of fifteen percent of all monies received by the Exchange. This fee was A-U's sole source of income. The subscribers were entitled to any profits and assets of the Exchange upon dissolution, and A-U had no interest in those assets. Through the Exchange, A-U operated in a manner similar to a mutual insurance company. All assets of the Exchange were subject to the liability of the insurance operation; however, none of A-U's assets were available to those claimants. Furthermore, A-U and the Exchange maintained completely separate books and records, and the Exchange filed federal income tax returns separate from A-U.

The Revenue Department contended that A-U and the Exchange were two separate taxable entities. Thus, premiums and other receipts of the Exchange which were paid to A-U, as attorney-in-fact, were taxable, and, consequently, the receipt of the management fee by A-U was a second taxable event.⁵⁴ A-U, on the other hand, argued that for gross tax purposes the whole enterprise was one taxable entity and that a second tax levied upon the fifteen percent management fee amounted to a double taxation which conflicted with the Indiana interinsurance statute. A-U relied heavily on the provision of the interinsurance statute which limits the taxation of an attorney-in-fact, such as A-U, to that which would be imposed on a mutual insurance company.⁵⁵ According to A-U, the position of the Revenue Department, if upheld, would contravene the interinsurance statute.

⁵³See IND. CODE § 27-6-6-1 (1982) which gives subscribers the authority to exchange reciprocal interinsurance contracts.

⁵⁴See IND. CODE § 6-2-1-1(a) (1976) (currently codified, in part, at *id.* § 6-2.1-1-16 (1982)).

⁵⁵*Id.* § 27-6-6-12 (1982).

In reversing the trial court, the court of appeals held that A-U and the Exchange were two separate and distinct taxable entities.⁵⁶ The court noted that it is a common occurrence under the Indiana Gross Income Tax Act for an agent to sell goods or to otherwise produce income for a principal which creates both a taxable event for the principal, as to the sale, and a taxable event for the agent, as to the commission. From a practical standpoint, the court stated that:

[W]e view A-U as desiring to treat the Exchange as a separate entity to maintain insulation from liability, and on the other hand, as desiring to escape dual taxation by calling itself and the Exchange one single enterprise. We agree with the Department that for the purpose of the Indiana Gross Income Tax the Exchange is a pool, association, cooperative association, or other group or combination acting as a unit, and therefore is a taxable entity.⁵⁷

In addition, the court noted that the enactment of the inter-insurance statute pre-dated the enactment of the Indiana Gross Income Act of 1933 and rejected A-U's argument that the language of interinsurance statutes was controlling.⁵⁸

Two other gross income tax decisions are significant vis-a-vis the planning impact which results from determinations of what types of structures are taxpaying entities for gross income tax purposes. In *Indiana Department of Revenue v. Glendale-Glenbrook Associates*⁵⁹ and *Park 100 Development Co. v. Indiana Department of State Revenue*,⁶⁰ the Indiana Supreme Court vacated opinions of the court of appeals⁶¹ and adopted a more pragmatic and less literal interpretation of the section of the gross income tax statute which makes partnerships with at least one corporate partner subject to the gross income tax.⁶²

⁵⁶429 N.E.2d at 312.

⁵⁷*Id.*

⁵⁸*Id.*

⁵⁹429 N.E.2d 217 (Ind. 1981).

⁶⁰429 N.E.2d 220 (Ind. 1981).

⁶¹The opinions vacated are *Indiana Dep't of Revenue v. Glendale-Glenbrook Assoc.*, 404 N.E.2d 1179 (Ind. Ct. App. 1980) and *Park 100 Dev. Co. v. Indiana Dep't of State Revenue*, 388 N.E.2d 293 (Ind. Ct. App. 1979).

⁶²IND. CODE § 6-3-7-1(b) (1976) (amended 1981). This code section was amended in 1981 to rectify the result of a strict literal application of the pre-1981 code section. Although the supreme court's decisions in *Glendale-Glenbrook* and *Park 100* were decided based upon the pre-1981 code section, the result in both cases is consistent with the 1981 amendment. The text of the amended provisions reads:

In the event the tax imposed by IC 6-3-1 through IC 6-3-7 is held inapplicable or invalid with respect to any person, or the shareholders of any corporation described in IC 6-3-2-3(b), or the partners of any such partnership, then notwithstanding IC 6-2-1-3-23 or IC 6-2-1-3-24 such person or such

In *Indiana Department of Revenue v. Glendale-Glenbrook Associates*, the taxpayer was a partnership composed of individuals and one corporate partner, a mutual life insurance company which was engaged in a shopping center development, management, and leasing business. The Revenue Department asserted that the partnership was subject to the gross income tax under Indiana Code section 6-3-7-1(b)⁶³ which provided that all partnerships, in which one or more of the partners is a corporation, are liable for the tax. The taxpayer contended that it was exempt on the basis of the statutory exemption for qualified insurance companies.⁶⁴ In other words, because each partner was exempt from the tax by being either an individual or an exempted insurance company, the partnership was not a taxable entity. In holding Glendale-Glenbrook was subject to the tax, the court of appeals stated that the language of Indiana Code section 6-3-7-1(b) was clear and unambiguous on its face and did not distinguish between types of corporations.⁶⁵ Thus, according to the court of appeals, the composition of the partnership was significant only for purposes of determining the presence of a corporate partner.

In vacating the opinion of the court of appeals and affirming a summary judgment of the trial court, the Indiana Supreme Court noted, in *Glendale-Glenbrook*, that the purpose of Indiana Code section 6-3-7-1(b) "was to plug a tax loophole where one corporation which was paying gross income tax might join with another corporation to form a partnership to circumvent the tax."⁶⁶ The supreme court recognized that Glendale-Glenbrook's sole corporate partner was not trying to evade the payment of taxes by its participation in the partnership and stated that the very reason insurance companies were exempted from paying gross income tax was because they were subject to taxation under Indiana insurance law. Considering the gross income tax statute as a whole, the supreme court found that a strictly literal interpretation of Indiana Code section 6-3-7-1(b) under the facts before it "would lead to injustice, absurdity or contradictory provisions."⁶⁷ Consequently, the partnership was found to be exempt from the tax.⁶⁸

corporation or such partnership shall be liable for the tax on gross income as imposed by IC 6-2-1 for the taxable periods with respect to which the tax under IC 6-3-1 through IC 6-3-7 is held inapplicable or invalid.

Id. § 6-3-7-1 (1982).

⁶³IND. CODE § 6-3-7-1(b) (1982).

⁶⁴The provision of the Act exempting qualified insurance companies is codified at IND. CODE § 6-3-2-3(d) (1982). Insurance companies are subject to tax under IND. CODE § 27-1-18-2 (1982).

⁶⁵404 N.E.2d at 1179.

⁶⁶429 N.E.2d at 219.

⁶⁷*Id.*

⁶⁸*Id.*

*Park 100 Development Co. v. Indiana Department of State Revenue*⁶⁹ involved a multi-tiered partnership structure. The taxpayer was a partnership consisting of an individual and two partnerships. One of those partnerships was comprised of two partners, both of which were general business corporations. The Revenue Department asserted that the taxpayer was subject to the gross income tax under Indiana Code section 6-3-7-1(b)⁷⁰ on the theory that this section should be applied to any partnership which has, as a partner, a separate partnership, one of the partners of which is a corporation. In reversing the trial court, the court of appeals found that the gross income tax was improperly assessed against the taxpayer on the grounds that the literal language of section 6-3-7-1(b) rendered the statute inapplicable to the taxpayer.⁷¹ Under the approach of the court of appeals' decision, a multi-tiered partnership structure represented an intriguing planning device for ventures in which corporate participation was involved.

The supreme court observed that such a literal application of the statute would clearly contravene the intent of the legislature which was to prevent a corporation subject to the gross income tax from circumventing the tax by joining another corporation to form a partnership. In vacating the appellate court decision, the supreme court stated that a corporation should not be allowed to "escape the corporate tax liability indirectly by forming a two-tiered partnership when it [the legislature] did not allow a corporation to escape that liability as a direct or first-tier partner."⁷² Thus, one of the reasons for using a multi-tiered partnership structure has been eliminated.

3. *Procedure.*—*State v. Meadowood Indiana University Retirement Community, Inc.*⁷³ presented the court of appeals with the question of whether a corporation could seek declaratory relief from the Revenue Department's ruling which denied tax exempt status to the corporation prior to the assessment of taxes by the Revenue Department. In this case, Meadowood applied for tax exempt status with

⁶⁹429 N.E.2d 220 (Ind. 1981).

⁷⁰Prior to the 1981 amendment, the statute read:

Every partnership of which one or more of the partners is a corporation shall be liable for the tax imposed by Sections 2 and 3 of the Gross Income Tax Act of 1933 as amended (IC 1971, 6-2-1, 2 and 3) and by the Adjusted Gross Income Tax Act of 1963 as amended (IC 1971, 6-3-1 through 6-3-7). No partner of such partnership shall be liable for the tax imposed on the partner's distributive share of the partnership income by the Gross Income Tax Act of 1933 as amended or the Adjusted Gross Income Tax Act of 1963 as amended.

IND. CODE § 6-3-7-1(b) (1976) (amended 1981). See *supra* note 62.

⁷¹429 N.E.2d at 223 (citing the holding in *Park 100 Dev. Co. v. Indiana Dep't of State Revenue*, 388 N.E.2d 293 (Ind. Ct. App. 1979)).

⁷²429 N.E.2d at 223.

⁷³425 N.E.2d 791 (Ind. Ct. App. 1981).

the Revenue Department, and the application was denied. This denial was affirmed on administrative appeal, and Meadowood filed suit seeking a declaratory judgment that it was tax exempt as a "corporation organized and operating exclusively for charitable, educational, and civic purposes."⁷⁴ The trial court entered judgment declaring that Meadowood was entitled to tax exempt status.

On appeal, the Revenue Department argued that Meadowood's exclusive statutory remedy was to pay the taxes and then to bring an action to recover those taxes. Meadowood asserted that the anti-injunction statute⁷⁵ was not applicable under the facts because no assessment had been made. According to Meadowood, to disallow the declaratory judgment would leave the taxpayer without a statutory remedy.

The court of appeals reversed the verdict of the trial court and instructed the trial court to sustain the Revenue Department's motion to dismiss.⁷⁶ In rejecting Meadowood's argument, the court stated that Meadowood was not without a remedy because a taxpayer always may pay, voluntarily, the taxes owed prior to an assessment by the Revenue Department. Then the taxpayer may request a refund, and if the refund is denied, according to the court, the taxpayer may then bring suit in a trial court. Upon this reasoning, the appellate court held that the statutory refund procedure is an exclusive remedy regardless of whether an assessment has been made.⁷⁷

D. Judicial Review of State Tax Board Assessments

In *State Board of Tax Commissioners v. South Shore Marina*,⁷⁸ the court of appeals delineated the limitations placed upon a trial court's review of State Tax Board decisions. Noting that appeals from State Tax Board decisions are, statutorily, not subject to the requirements of the Administrative Adjudication Act,⁷⁹ the court held that the standard of review of State Tax Board decisions should be substantially equivalent to the standard of review under the Administrative Adjudication Act.⁸⁰ The court stated that "[j]udicial review . . . is limited to whether the agency possessed jurisdiction over the subject matter

⁷⁴*Id.* at 722-23. Such corporations are tax exempt under IND. CODE § 6-2.1-3-20(a)(8) (1982).

⁷⁵IND. CODE § 6-2-1-19(d) (1976). The anti-injunction principle is now part of the Indiana Administrative Tax Code. *Id.* § 6-8.1-9-1(d) (1982).

⁷⁶425 N.E.2d at 793.

⁷⁷*Id.*

⁷⁸422 N.E.2d 723 (Ind. Ct. App. 1981). See Smith, *Administrative Law, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 1, 18 (1983).

⁷⁹422 N.E.2d at 727 n.2 (citing IND. CODE § 4-22-1-2 (1976)).

⁸⁰422 N.E.2d at 727.

and whether the agency's decision was made pursuant to proper procedures, was based upon substantial evidence, was not arbitrary or capricious, and was not in violation of any constitutional, statutory or legal principle."⁸¹ The importance of the *South Shore Marina* decision lies in the guidelines which the court set forth for review of such cases under the above definition.

The facts of *South Shore Marina* are particularly relevant. South Shore Marina was assessed property taxes on approximately fifty boats located on its property. The Marina claimed that it rented space to boat owners for the storage of their boats and boating equipment, and therefore had no ownership or possessory interest in the boats. At a hearing of the State Tax Board, the Marina was requested to produce a list of boats which were stored on its property and a list of the respective owners. The Marina refused to produce such lists. The State Tax Board repeated the request at a subsequent hearing, in a letter, and in a subpoena duces tecum. Without variation, the Marina insisted that it was not liable for the assessment on the boats and had no legal obligation to produce the requested information. The State Tax Board responded by assessing the Marina for the value of the boats in the State Tax Board's Final Assessment Determination. The Marina appealed the assessment to the county superior court, asserting that it did not hold, possess, or control the boats as required by the applicable taxing statute.⁸² The trial court entered judgment for the Marina and vacated the State Tax Board's assessment on the boats.

The court of appeals vacated the judgment of the trial court and reinstated the State Tax Board's final assessment, holding that the trial court erred in its standard of judicial review.⁸³ The court stated that the issues which should have been addressed by the trial court were limited to whether the State Tax Board's decision was arbitrary or capricious, was based upon substantial evidence, and was not in violation of any constitutional, statutory, or legal principle.

The court defined an arbitrary or capricious administrative act as "one which is willful and unreasonable, without consideration and in disregard of the facts or circumstances in the case."⁸⁴ Recognizing that leaving the boats unassessed would clearly violate constitutional and legislative mandates under which the State Tax Board operates, the court stated that:

[T]he Board could not reasonably do other than assess the

⁸¹*Id.* (footnotes omitted).

⁸²See IND. CODE § 6-1.1-2-4(b) (1982).

⁸³422 N.E.2d at 727.

⁸⁴*Id.*

boats to Marina. The assessment was invited by and was the natural consequence of Marina's actions. Marina may not now urge error predicated upon those actions. Marina characterizes the Board's action as arbitrary and capricious. To the contrary, the assessment was the reasonable and considered result with respect to the facts and circumstances confronting the Board.⁸⁵

In a footnote, the court noted that this result does not stand for the proposition that a taxpayer must automatically supply the information sought by the State Tax Board; rather, according to the court, it stands for the proposition that a taxpayer's refusal must be based on legitimate grounds.⁸⁶

In determining whether there was substantial evidence before the State Tax Board to support its final assessment, the court adopted the test set forth in *Evansville v. Southern Indiana Gas & Electric Co.*⁸⁷ Although that case involved the review of a Public Service Commission decision, the court in *Evansville* stated that a reviewing court could only set aside agency findings of fact when a review of the entire record "clearly indicates that the agency's decision lacks a reasonably sound basis of evidentiary support."⁸⁸ The court in *South Shore Marina* found that there was substantial evidence to support the State Tax Board's final assessment because the evidence clearly established that fifty boats were on Marina's property on the assessment date and the evidence clearly established the value of these boats.⁸⁹

In determining whether the State Tax Board violated any legal principles by its assessment on the Marina, the court noted that the legislature created the State Tax Board and specifically gave the State Tax Board the power to promulgate rules and regulations concerning discovery of information relevant to assessment determinations. The court recognized that broad investigatory powers were necessary to the proper execution of the State Tax Board's tax assessment responsibility. Furthermore, to construe the property tax statute as not permitting the assessment of property taxes on the *apparent* owner, holder, or possessor of the property would be contrary to the constitutional and legislative mandates placed on the State Tax Board.⁹⁰ In holding that the State Tax Board's assessment did not violate any of these legal principles, the court stated that it has long been established that

⁸⁵*Id.* at 730.

⁸⁶*Id.* at 730-31 n.4.

⁸⁷167 Ind. App. 472, 339 N.E.2d 562 (1975).

⁸⁸*Id.* at 485, 339 N.E.2d at 572.

⁸⁹422 N.E.2d at 731.

⁹⁰*Id.* at 734 (construing IND. CONST. art. 10, § 7 and IND. CODE § 6-1.1-2-1 (1976)).

the burden of nonliability is placed on the individual assessed.⁹¹ The court noted that to hold otherwise would provide the dishonest with an incontrovertible method of avoiding liability by merely disclaiming ownership, possession, or control of the property in question.

The *South Shore Marina* case provides the basic guidelines for judicial review of future State Tax Board decisions and re-emphasizes that the burden of proving nonliability is clearly on the taxpayer. While the express requirements of the Administrative Adjudication Act may not apply to State Tax Board decisions, the court has once again recognized that this agency and the reviewing courts will be subject to basic administrative law requirements which are substantially equivalent to the requirements under the Administrative Adjudication Act.

E. Legislative Developments

As previously noted, the actions of the 1982 General Assembly with respect to Title 6 of the Indiana Code cannot be considered extraordinarily significant from a purely legal standpoint. Rather, much of the legislative activity may be viewed as a political response to the budgetary concerns engendered by the decrease in state revenues which has resulted from national economic problems and from the decrease in certain tax rates which Indiana taxpayers have enjoyed over the past few years.⁹² Furthermore, a substantial portion of the significant legislative activity can be attributed to the legislative response to ERTA.⁹³

The following is a summary of the actions of the 1982 General Assembly relating to Indiana taxation which are deemed to be significant by the author. Of course, other legislative actions may have significance in individualized cases.

1. *Net Income Taxes.*—a. *General changes based on the Economic Recovery Tax Act of 1981 (ERTA).*—The income tax provisions of Title 6 contain various references to the Internal Revenue Code.⁹⁴ These

⁹¹422 N.E.2d at 735 (citing *Prudential Casualty Co. v. State*, 194 Ind. 542, 143 N.E. 631 (1924); *Buck v. Miller*, 147 Ind. 586, 47 N.E. 8 (1896); *Fell v. West*, 35 Ind. App. 20, 73 N.E. 719 (1905)).

⁹²The gross income tax phase out, begun in 1973, has seen the tax rates reduced from 2% to 1.3% at the retail level and from 5% to .325% at the wholesale level. IND. CODE § 6-2-1-3 (1976) (repealed 1981); *id.* § 6-2.1-2-3 (1982). The adjusted gross income tax rate for individuals is now 1.9% as opposed to the former 2% rate. *Id.* § 6-3-2-1 (1982). The phase out of the tax on intangibles begins this calendar year with the rate reduction from .25% to .233%. *Id.* § 6-5.1-2-2 (1982).

⁹³See Act of Feb. 25, 1982, Pub. L. No. 52, 1982 Ind. Acts 494.

⁹⁴See, e.g., IND. CODE § 6-3-1-11 (1982) (defining "Internal Revenue Code" for adjusted gross income tax purposes); *id.* § 6-3-1-17 (incorporating by reference Internal Revenue Code sections).

references are to the provisions of the Internal Revenue Code in effect on a particular date. With the adoption, by Congress, of ERTA and the various provisions therein affecting federal tax computations which are the starting point for state net income tax computations for the 1981 tax year and future years, the Title 6 references to the Internal Revenue Code, in effect, became dated. In adopting Public Law 52,⁹⁵ the Indiana legislature revised and updated the Internal Revenue Code references to include both the Internal Revenue Code and the regulations thereunder, which became effective on January 1, 1982. As a result, the amendments to the Internal Revenue Code effected by ERTA, which affect taxable years beginning after January 1, 1982, are effective for Indiana net income tax purposes.

In adapting ERTA to Indiana net income taxes, however, the Indiana legislature either negated or delayed the effect of certain specific portions of ERTA. For instance, the new accelerated cost recovery system (ACRS),⁹⁶ which effectively replaces the federal depreciation system⁹⁷ with respect to assets placed in service during 1981, was not made effective for Indiana tax purposes until 1982.⁹⁸ That is, ACRS does not apply to Indiana taxpayers until tax years which began after 1981. Thus, for taxable years which began in 1981, taxpayers will be required to use one system, ACRS, for federal tax purposes and another system, depreciation, for state tax purposes.

Section 128 of the Internal Revenue Code provides for an exclusion from gross income of interest earned from a type of investment certificate commonly known as an "All Savers Certificate."⁹⁹ This interest exclusion, applicable to individual taxpayers, has been effectively negated for Indiana adjusted gross income tax purposes by the provision in Public Law 52 which makes that exclusion unavailable for any taxable year beginning before January 1, 1982 and creates an add-back provision¹⁰⁰ for excluded interest for all taxable years beginning before January 1, 1985.

Further, with respect to individual taxpayers, the newly implemented federal "marriage penalty" deduction provisions,¹⁰¹ effective for tax years beginning in 1982, have not been incorporated into the Indiana adjusted gross income tax structure.¹⁰² The marriage penalty deduction, allowed for federal purposes pursuant to section 221 of the

⁹⁵Act of Feb. 25, 1982, Pub. L. No. 52, 1982 Ind. Acts 494.

⁹⁶I.R.C. § 168 (Law. Co-op. Supp. 1982).

⁹⁷*Id.* § 167 (1976).

⁹⁸Act of Feb. 25, 1982, Pub. L. No. 52, 1982 Ind. Acts 494, 499.

⁹⁹I.R.C. § 128 (Law. Co-op. Supp. 1982).

¹⁰⁰IND. CODE § 6-3-1-3.5(a)(10) (1982).

¹⁰¹I.R.C. § 221 (Law. Co-op. Supp. 1982).

¹⁰²IND. CODE § 6-3-1-3.5(a)(9) (1982).

Internal Revenue Code, must be added back to gross income when determining Indiana adjusted gross income.

b. *Research credit.*—For taxable years beginning after December 31, 1981, a new Indiana research expense credit becomes effective.¹⁰³ The credit may be taken by any taxpayer entitled to utilize the research expense credit provided by section 44F of the Internal Revenue Code,¹⁰⁴ who incurs "Indiana qualified research expenses."¹⁰⁵ Structured as an incentive to increase research, the credit is based upon the "incremental research amount" of the taxpayer. This amount is defined as being the excess of the research expenditures for the current taxable year over the average yearly research expenditures during a base period consisting of the three preceding taxable years.¹⁰⁶ To phase in the credit, transitional rules are provided for the first two years of implementation.¹⁰⁷ The credit is effective for qualified research expenses incurred during the period from January 1, 1982 through December 31, 1985.¹⁰⁸

Because of the Internal Revenue Code reference¹⁰⁹ and the statutory enactment of the Indiana qualified research credit, the research credit will apply to two types of expenses paid or incurred in carrying on any type of trade or business. The first type of expenses is "in-house research expenses."¹¹⁰ This includes expenses for research wages and supplies plus lease and other charges for research equipment used. As to any particular individual, the wages which are included in qualified expenditures must be paid to an individual whose services substantially consist of direct research activities, supervision, or support thereof. The second type of qualified expenses is "contract research expenses."¹¹¹ These amounts consist of expenditures to a non-employee for qualified research; however, only 65% of such expenses qualify for the credit.

Under the statutory provisions, a taxpayer with no income apportioned to Indiana pursuant to Indiana Code section 6-3-2-2 is entitled to a credit for that year equal to the increase in the taxpayer's Indiana qualified research expenses, over the base period Indiana qualified research expenses, multiplied by 2% for tax years beginning in 1982

¹⁰³Act of Feb. 25, 1982, Pub. L. No. 52, 1982 Ind. Acts 494 (codified at IND. CODE § 6-3-3.8-1 to -6 (1982)).

¹⁰⁴I.R.C. § 44F (Law. Co-op. Supp. 1982).

¹⁰⁵IND. CODE § 6-3-3.8-2(a) (1982).

¹⁰⁶*Id.* § 6-3-3.8-2(b).

¹⁰⁷*Id.* § 6-3-3.8-2(d).

¹⁰⁸*Id.* §§ 6-3-3.8-2, -6.

¹⁰⁹*Id.* § 6-3-3.8-4 (this reference is to Internal Revenue Code section 44F).

¹¹⁰I.R.C. § 44F(b)(2) (Law. Co-op. Supp. 1982).

¹¹¹*Id.* § 44F(b)(3).

and 1983, and 5% for tax years beginning in 1984 and 1985.¹¹² A taxpayer with income apportioned to Indiana, for any particular year, is entitled to a credit for that year equal to the lesser of the credit to which the taxpayer would have been entitled had it not had any income apportioned to Indiana, or its increase in total qualified research expenses over its total base period qualified research expenses, multiplied by the calendar year percentage amount provided above and by its apportionment percentage for that taxable year.¹¹³

In terms of its application, the credit is applied against the gross, adjusted gross, and supplemental corporate net income taxes.¹¹⁴ The credit is taken only after all other applicable credits against the taxes are applied.¹¹⁵ The credit is a nonrefundable credit,¹¹⁶ and any unused portions of the credit may be carried forward for fifteen years.¹¹⁷ However, the credit may not be carried back.¹¹⁸

In determining which research expenses may qualify as Indiana research expenses, the following factors are to be considered: "(1) the place where the [research] services are performed, (2) the residence or business location of the person or persons performing the services, (3) the place where qualified research supplies are consumed, and (4) other factors that the department determines are relevant for the determination."¹¹⁹

c. *Supplemental corporate net income tax.*—Effective as of January 1, 1982, the supplemental corporate net income tax rate is increased from 3% to 4%.¹²⁰ For fiscal year taxpayers, the rate increase for years ending in 1982 is prorated so that the former 3% rate applies for portions of the fiscal year occurring before January 1, 1982, and the 4% rate applies for portions of the fiscal year occurring during 1982. The Revenue Department has provided a schedule of precomputed supplemental net income tax rates for 1981-1982 fiscal years.¹²¹

d. *Acceleration of tax payments.*—Effective as of April 1, 1982, employers, partnerships, corporations, trusts or estates are required to file returns on income tax withheld and are required to pay the tax so withheld, within twenty days after the end of each month for

¹¹²IND. CODE § 6-3-3.8-2(b) (1982).

¹¹³*Id.* § 6-3-3.8-2(c).

¹¹⁴*Id.* § 6-3-3.8-3(a).

¹¹⁵*Id.*

¹¹⁶*Id.* § 6-3-3.8-3(c).

¹¹⁷*Id.* § 6-3-3.8-3(a) (incorporating the I.R.C. § 44F(g)(2)(A)(ii) (Law Co-op. Supp. 1982) provision for a fifteen-year carryforward).

¹¹⁸IND. CODE § 6-3-3.8-3(c) (1982).

¹¹⁹*Id.* § 6-3-3.8-5.

¹²⁰Act of Feb. 25, 1982, Pub. L. No. 52, 1982 Ind. Acts 494, 499 (codified at IND. CODE § 6-3-8-4.1 (1982)).

¹²¹INCOME TAX DIV. INFORMATION BULL. NO. 58, 5 IND. REG. 789, 790 (April 1982).

which the return is filed, if the average monthly payment for the preceding year exceeded \$1,000.¹²² Further, monthly reports and payments may be required by the Revenue Department within the twenty day period if the Revenue Department estimates that the taxpayer's monthly average payment for the current year will exceed \$1,000.¹²³

2. *Property Taxes.*—a. *Deduction procedures.*—Effective as of January 1, 1982, the procedure for claiming a property tax deduction for mortgages, blindness, senior citizens, veterans, veterans' surviving spouses, and World War I veterans has been amended; the amendment provides that a taxpayer who receives such a deduction for prior years, and who remains eligible for the deduction, is not required to file a claim of entitlement for the deduction for the following year.¹²⁴ Rather, if the taxpayer should become ineligible for any such deduction, the county auditor must be notified of ineligibility prior to May 10 of the year in which the ineligibility occurs.¹²⁵

b. *Library district levy limitations.*—The State Board of Tax Commissioners may not permit a library district to increase its levy in excess of published amounts. Such an increase is limited to the lesser of 125% of the levied rate for the prior budget year or the rate the district would have levied had it not applied for an increase plus \$.05.¹²⁶ Under a new legislative provision, school corporations incurring shortfalls caused by erroneous tax figures may be permitted to collect an excessive tax levy in the year following the shortfall.¹²⁷

3. *Sales and Use Taxes.*—Effective as of April 1, 1982, the due dates for the filing of sales and use tax returns and the remittance of such taxes is accelerated.¹²⁸ If a taxpayer's average monthly liability for collections of sales and use taxes for the preceding year exceeded \$1,000, such returns and payments must be made not more than twenty days after the close of each month.¹²⁹ Additionally, the fees applicable to retail merchants have been changed.¹³⁰ Effective January

¹²²Act of Feb. 25, 1982, Pub. L. No. 49, 1982 Ind. Acts 477, 481 (codified at IND. CODE § 6-3-4-8.1(a) (1982)).

¹²³IND. CODE § 6-3-4-8.1(b) (1982).

¹²⁴Act of Feb. 18, 1982, Pub. L. No. 44, 1982 Ind. Acts 448, 452 (codified at IND. CODE § 6-1.1-12-17.8(a) (1982)).

¹²⁵IND. CODE § 6-1.1-12-17.8(b) (1982).

¹²⁶Act of Feb. 25, 1982, Pub. L. No. 54, 1982 Ind. Acts 506, 511 (codified at IND. CODE § 6-3.5-1-12(e)(xiii) (1982)).

¹²⁷IND. CODE § 6-3.5-1-12(f) to (g) (1982).

¹²⁸Act of Feb. 25, 1982, Pub. L. No. 49, 1982 Ind. Acts 477 (codified at IND. CODE § 6-2.5-6-1(a) (1982)).

¹²⁹IND. CODE § 6-2.5-6-1(a) (1982).

¹³⁰Act of Feb. 18, 1982, Pub. L. No. 50, 1982 Ind. Acts 487 (codified at IND. CODE § 6-2.5-8-1 (1982)).

1, 1983, a one time \$25.00 fee is imposed for each place of business of a retail merchant.¹³¹ The new certificates issued for the \$25.00 fee are valid so long as the merchant remains in business.¹³²

4. *Inheritance Tax.*—The legislature passed three acts amending the inheritance tax law. The former requirement that a person in possession or control of personality owned by an Indiana decedent or held jointly by an Indiana decedent and the decedent's surviving spouse notify the Revenue Department or the county assessor of the county of the decedent's domicile regarding the transfer of such property to the surviving spouse has been repealed effective June 1, 1982; however, this change is effective only with respect to decedents dying after May 31, 1982.¹³³

The exemptions and reductions to the inheritance tax have been broadened. Formerly, the reduction in taxable value for the portion of jointly held survivorship personality attributable to the survivor's contribution required the survivor to prove not only the "value of that portion of the . . . property which . . . belonged" to the survivor but also that that portion never "belonged" to the decedent.¹³⁴ Effective June 1, 1982, the latter restriction has been eliminated.¹³⁵ Additionally, the statutory language regarding exemptions for transfers to each of the children of a decedent has been clarified to insure that the \$10,000 and \$5,000 exemptions, applicable to children under and over twenty-one respectively, are available with respect to transfers to *each* child of a decedent.¹³⁶ The "orphan's exemption" has been eliminated.¹³⁷ The children's exemptions as clarified and the elimination of the orphan's exemption are effective retroactively to certain dates under a schedule which precludes "double exemptions."¹³⁸ The parents' exemption has also been clarified to insure that the exemption applies to transfers to each, as opposed to one, parent of a decedent.¹³⁹

The inter-spousal transfer exemption has been clarified in certain respects and modified to complement the new federal estate tax "qualified terminable interest property" concept instituted by ERTA.¹⁴⁰

¹³¹IND. CODE § 6-2.5-8-1(b) (1982).

¹³²*Id.* § 6-2.5-8-5.

¹³³Act of Feb. 24, 1982, Pub. L. No. 57, 1982 Ind. Acts 517 (repealing IND. CODE § 6-4.1-8-4.5 (1982)).

¹³⁴IND. CODE § 6-4.1-2-5 (Supp. 1981) (amended 1982).

¹³⁵Act of Feb. 18, 1982, Pub. L. No. 56, 1982 Ind. Acts 516 (codified at IND. CODE § 6-4.1-3-9.1 (1982)).

¹³⁶IND. CODE §§ 6-4.1-3-9.1 to -9.5 (1982).

¹³⁷Act of Feb. 18, 1982, Pub. L. No. 56, 1982 Ind. Acts 516, 517 (previously codified at IND. CODE § 6-4.1-3-8.5 (Supp. 1981)).

¹³⁸Act of Feb. 18, 1982, Pub. L. No. 56, 1982 Ind. Acts 516, 517.

¹³⁹*Id.* at 516-17 (codified at § 6-4.1-3-9.7 (1982)).

¹⁴⁰See I.R.C. § 2056(b) (Law. Co-op. Supp. 1982).

In 1979, the exemption applicable to inter-spousal transfers was broadened to apply to “[e]ach property interest which a decedent transfers to his surviving spouse . . . ;”¹⁴¹ however, the Revenue Department has, on occasion, taken the position that the full inter-spousal exemption was not available for transfers where the survivor takes a life estate with a general power of appointment. By referencing the code section to the federal marital deduction provisions applicable to powers of appointment, the Inheritance Tax Act now makes it clear that the full exemption applies to such transfers.¹⁴²

ERTA changed the previously existing treatment for marital deductions purposes of life income interests by establishing that “qualified terminable interest property” (QTIP) can qualify for the marital deduction.¹⁴³ By referencing the Indiana Code provision to the QTIP provisions of the Internal Revenue Code, the inter-spousal exemption applies to QTIP.¹⁴⁴ That is, a decedent’s personal representative or the trustee or transferee of property may make an irrevocable election to treat QTIP as “a property interest which a decedent transfers to his surviving spouse,” thereby exempting the full value of the QTIP from inheritance taxation on the death of the first spouse.¹⁴⁵ As under ERTA, the price extracted for electing the full exemption is a tax on the full value of the QTIP at the death of the surviving spouse.¹⁴⁶

¹⁴¹IND. CODE § 6-4.1-3-7 (Supp. 1981).

¹⁴²Act of Feb. 18, 1982, Pub. L. No. 55, 1982 Ind. Acts 514, 515 (codified at IND. CODE § 6-4.1-3-7(b), (c) (1982)).

¹⁴³I.R.C. § 2056(b)(7) (Law. Co-op. Supp. 1982).

¹⁴⁴IND. CODE § 6-4.1-3-7(c) (1982).

¹⁴⁵*Id.* at § 6-4.1-3-7(d).

¹⁴⁶*Id.* at § 6-4.1-2-4(d).

XVII. Torts

SUSANAH M. MEAD*

A. Negligence

1. *Affirmative Duty to Control Actions of Another.*—The Indiana Courts of Appeals had several occasions during the survey period to address the aspect of duty in a negligence case. Of particular interest are the cases involving affirmative duties to act. The factual circumstances in *Estate of Mathes v. Ireland*¹ presented to the fourth district court of appeals an unusual context in which to consider the affirmative duty to control the actions of another. Kenneth Pierce abducted Brenda Mathes at knifepoint and drowned her in the St. Joe River. Brenda Mathes' husband brought a wrongful death action against Pierce, Pierce's mother, father, grandparents, and two psychiatric centers, one which formerly had Pierce in custody and one which had tested and evaluated him. At the time of the incident, Pierce lived with his mother and grandparents.

Mathes alleged that the mother and grandparents with whom Pierce lived knew he was insanely violent and that they had a responsibility to supervise him and control his activities. Mathes also claimed in his complaint that the staff at the psychiatric center, which had the killer in custody, and the staff at the psychiatric center, which had been responsible for testing and evaluating him, violated a duty if they knew or should have known it was dangerous to release him without providing extended treatment.² The trial court dismissed all the complaints, except the one against Pierce, for failing to state a claim upon which relief could be granted.³ The court of appeals, complying with the rule enunciated in *State v. Rankin*,⁴ held that all the claims except as to Pierce's father, who lived elsewhere, were prematurely dismissed.⁵

Mathes argued that because Pierce resided with his mother and grandparents, they knew Pierce to be violent and dangerous and they therefore had a responsibility to supervise Pierce and control his activities. The court agreed and, quoting from the *Restatement (Second)*

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¹419 N.E.2d 782 (Ind. Ct. App. 1981).

²*Id.* at 785.

³See IND. R. TR. P. 12(b)(6).

⁴260 Ind. 228, 294 N.E.2d 604 (1973).

⁵419 N.E.2d at 784. The court expressed at the outset its doubts as to whether the plaintiff would ultimately be able to prove his case and made clear that it reversed because of the holding in *State v. Rankin*. In *Rankin*, the supreme court held that “[a] complaint is not subject to dismissal unless it appears to a certainty that the plaintiff would not be entitled to relief under any set of facts” 260 Ind. at 230, 294 N.E.2d at 606 (emphasis in original).

of *Torts* section 319, stated that “[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.”⁶ The court was careful to point out that although the situation in *Mathes* involved a mother and grandparents, the duty does not rest upon any familial relationship but upon the assumption of care and control of one known by the third person to be dangerous and likely to commit bodily harm.⁷

The court recognized, however, that families should not be discouraged from taking responsibility for “the treatment of less fortunate members of the family” and thus stressed that the injured party must show not only an actual taking charge of the dangerous individual, but also a knowledge of the likelihood he will cause harm.⁸ In this regard, the custodians’ reasonable reliance on medical advice may relieve them of responsibility.⁹

In adopting this novel approach, the court failed to note that this theory of liability has never been recognized in Indiana or that this decision is a dramatic departure from the basic common law premise of every man for himself; that is, in the absence of a special relationship, there is no affirmative duty to control the conduct of others.¹⁰ However, the court was careful to state that “only under the most unusual set of circumstances” would the result be a successful verdict for the plaintiff.¹¹ Although the adoption of a theory of liability based on a duty to control another may be startling, the future ap-

⁶419 N.E.2d at 784 (quoting RESTATEMENT (SECOND) OF TORTS § 319 (1977)).

⁷419 N.E.2d at 784.

⁸*Id.*

⁹*Id.*

¹⁰At common law a parent was not responsible for his child’s torts. See *Moore v. Waitt*, 157 Ind. App. 1, 298 N.E.2d 456 (1973). Certain exceptions developed in the case law, and in 1957 the Indiana legislature enacted a statute which allowed victims to recover up to \$750 from the parents of a tortious child for “any and all damage proximately caused by the injury to or destruction of any property, real, personal or mixed by the intentional or wilful or malicious act or acts of such minor.” IND. CODE § 31-5-10-1 (1976) (repealed 1978) (current version at IND. CODE § 34-4-31-1 (1982)). However, any exceptions, whether derived from case law or statute, only applied when the child was a minor. *Mathes*, 419 N.E.2d at 787 (Hoffman, J., dissenting). In *Mathes*, Pierce was twenty years old, and the rule enunciated by the majority is neither based upon nor limited by the parent-child relationship.

The dissenting judge in *Mathes* objected to the majority’s decision because it might result in a violation of due process in that *Mathes*’ complaint does not allege that an adjudication of Pierce’s insanity was ever made. *Id.* at 788. Before one can be involuntarily subjected to the control and custody of another, he is entitled to a court determination of insanity. *Id.* (See IND. CODE §§ 16-14-9.1-1 to-18 (1982)).

¹¹419 N.E.2d at 784.

plication of such a theory is likely to be limited to the family custody situation.

In discussing the potential liability of the psychiatric centers, the court found that if the centers had actually taken charge of Pierce within the meaning of section 319 and had actual knowledge that he was dangerous, then they had a duty to exercise reasonable care.¹² The court thus clarified an aspect of the new duty which was ambiguous in the court's discussion of the duty of the mother and grandparents. Although section 319 requires only a constructive knowledge of a likelihood to do harm, in Indiana imposition of the duty apparently requires a finding of *actual knowledge* of danger.¹³

The first district court of appeals had an opportunity to consider the affirmative duty to control the actions of another to prevent injury to a third person in *Sports, Inc. v. Gilbert*.¹⁴ In *Sports, Inc.*, the defendants who are owners and operators of the Sportsdome Speedway employed off-duty police officers and special deputies for traffic and crowd control. On August 9, 1975, Thomas Riggs drove his pickup truck into the parking lot of the Sportsdome and had a minor accident with another car. When security guards arrived, they found Riggs hiding in a nearby lot. Although he was intoxicated, Riggs was cooperative and the guards did not arrest him. Instead, the guards found two relatives who drove Riggs in his truck away from the Sportsdome. Shortly after Riggs left the Sportsdome and had regained control of the truck, he collided with the Gilberts' car, killing two of the occupants and injuring the others. The Gilberts sued Sports, Inc. for wrongful death of their two children and for their own personal injuries, and, at the trial, the jury found for the plaintiffs. Defendants appealed, claiming they owed no duty to the Gilberts to prevent the intoxicated Riggs from driving away from the Sportsdome. The court of appeals agreed with the defendants and reversed.¹⁵

The court in *Sports, Inc.* systematically rejected the plaintiffs' various contentions that the defendant owed a duty of care in this situation. Plaintiffs relied on two Indiana cases which stand for the proposition that a duty may arise out of knowledge of a situation and a violation of this duty would constitute negligence.¹⁶ The court found these cases factually distinguishable.¹⁷ In addition, the court found that

¹²*Id.* at 785-86.

¹³*Id.* at 785.

¹⁴431 N.E.2d 534 (Ind. Ct. App. 1982).

¹⁵*Id.* at 534-35.

¹⁶*Id.* at 536 (citing *Snyder v. Mouser*, 149 Ind. App. 334, 346, 272 N.E.2d 627, 634 (1971); *Vandalia Ry. v. Duling*, 60 Ind. App. 332, 344, 109 N.E. 70, 73 (1915)).

¹⁷*Vandalia Ry. v. Duling*, 60 Ind. App. 332, 109 N.E. 70 (1915) dealt with a railroad's liability for injuries to animals who wander onto railroad tracks. *Snyder v. Mouser*,

the prerequisites for a successful assertion of a duty to control third persons, based on *Restatement (Second) of Torts* section 319, did not exist here, because section 319 contemplates a situation in which a third person is in the custody of the one charged with controlling him.¹⁸ To further buttress this finding, the court noted that the comment section to *Restatement (Second) of Torts* section 319 addresses situations in which the dangerous person is actually in a custodial setting such as a state mental hospital.¹⁹ Therefore, the court concluded that this section was not intended to apply to the factual context of *Sports, Inc.*²⁰

The first district distinguished the recent fourth district's decision which had relied on section 319, *Estate of Mathes v. Ireland*,²¹ on the basis that the relationships in *Mathes* were well established and continuing, whereas the relationship between *Sports, Inc.* and Riggs was "brief and accidental."²² It is worthy of note, however, that the "taking charge" of a third person as contemplated in *Mathes* was not custodial in the sense that those in charge had a legal obligation to keep the killer in custody.²³

The *Sports, Inc.* court also disagreed with the plaintiffs' contention that *Restatement (Second) of Torts* section 324A should apply. That section reads:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

¹⁴⁹ Ind. App. 334, 272 N.E.2d 627 (1971) dealt with a welfare worker's duty to warn foster parents of a child's homicidal tendencies. The court distinguished these cases on the basis that neither dealt with the liability for the negligence of the third party. *431 N.E.2d* at 536.

¹⁸ RESTATEMENT (SECOND) OF TORTS § 319 (1965) states: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." *Id.*

¹⁹ *431 N.E.2d* at 536.

²⁰ *Id.*

²¹ *419 N.E.2d* 782 (Ind. Ct. App. 1981). For a discussion of this case, see *supra* notes 1-13.

²² *431 N.E.2d* at 536 n.2.

²³ *Mathes*, *419 N.E.2d* at 787-88 (Hoffman, J., dissenting). The killer in *Mathes* had attained the age of majority and thus his parents were no longer legally responsible for his actions. Further, the killer had never been adjudicated mentally ill which could give rise to a duty to control. *Id.* at 787-88.

- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.²⁴

The court found that section 324A did not apply because there was no indication that Sports, Inc.'s actions increased the risk of harm to the plaintiffs, that the plaintiffs relied on Sports, Inc., or that Sports, Inc. undertook a duty owed by Riggs.²⁵ However, it cannot be denied that if Sports, Inc. had taken the intoxicated Riggs into custody, the accident would have been prevented. Under this view, Sports, Inc.'s action, or inaction, would certainly have increased the risk of harm to the Gilberts. Thus, the proper inquiry here should be whether failing to do so was a failure to exercise reasonable care.

The court also refused to accept the plaintiffs' theory of negligent entrustment of a chattel to an incompetent based upon *Restatement (Second) of Torts* section 390.²⁶ The court found that the rule enunciated in section 390 applies only to those who own or have a right to control the chattel in question, and Sports, Inc. had no right to control Riggs' truck.²⁷

The court in *Sports, Inc.* also failed to find the special kind of relationship between the defendant and Riggs necessary for an imposition of duty based upon the *Restatement (Second) of Torts* section 315. Section 315 states that there is a duty to control the conduct of a third person to avoid harm to another only if "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection."²⁸

Although the court conceded that an owner of land has a duty to protect business invitees from the acts of third persons if the danger to the invitee is foreseeable, it aptly pointed out that this theory did not apply in *Sports, Inc.* because the plaintiffs were not patrons of the Sportsdome.²⁹ Furthermore, any statutory liability imposed on one

²⁴RESTATEMENT (SECOND) OF TORTS § 324A (1965).

²⁵431 N.E.2d at 537.

²⁶*Id.*

²⁷*Id.* at 537. RESTATEMENT (SECOND) OF TORTS § 390 (1965) provides:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

²⁸RESTATEMENT (SECOND) OF TORTS § 315 (1965).

²⁹431 N.E.2d at 537-38.

who supplies alcoholic beverages under the Indiana Code³⁰ was inapplicable because Riggs did not consume alcohol at the Sportsdome.

Finally, the court in *Sports, Inc.* pointed out that the common thread woven through all the theories of liability for failure to control a third person espoused by the plaintiffs was that of "a person in need of special supervision . . . from someone who is in a superior position to provide it."³¹ Essential to this relationship is the right to intervene or control. The court found such a right to intervene absent in *Sports, Inc.*³² Because *Sports, Inc.* is a private entity, it had neither the power nor the duty to arrest Riggs.³³ Although the security force as off-duty police had the power to arrest, that power is conferred by the state and not by a private employer. *Sports, Inc.* did not "rent the state's police power" when it employed the off-duty police.³⁴ Therefore, the official inaction of the security guards could not be imputed to *Sports, Inc.*

The court's discussion of *Sports, Inc.*'s right to control its security force is fraught with difficulties and ambiguities. The court found that even though the security guards are employees, *Sports, Inc.* had no authority to require the guards to use their power to arrest because that power is conferred by the state. Thus, the employer/employee relationship is not the determining factor and negligent failure to arrest could not be imputed to *Sports, Inc.*

The court also pointed out, however, that the power to arrest is discretionary so that even if the plaintiffs could establish that the guards' negligent failure to enforce the law caused plaintiffs' injuries, the guards could claim governmental immunity.³⁵ The court concluded its discussion with the incredible statement that "[i]f the *Sports* employees are immune from liability for their failure to use powers granted to them by the State, their private employer is likewise immune."³⁶ Is the court suggesting that a private employer of a moonlighting governmental employee can claim governmental immunity if his employee negligently uses powers which can be seen as having been granted by the state? Such a suggestion raises questions and problems which are not within the scope of this Survey. However, it appears the court put *Sports, Inc.* in the enviable position of being

³⁰IND. CODE §§ 7.1-5-7-8, 7.1-5-10-15 (1982).

³¹431 N.E.2d at 538.

³²*Id.* at 538-39.

³³*Id.* at 539. The court found that a private citizen could be liable for false imprisonment in arresting someone for a misdemeanor. Because Riggs had, at worst, committed a misdemeanor, *Sports, Inc.* had no duty to make a citizen's arrest. *Id.*

³⁴*Id.*

³⁵*Id.* (citing IND. CODE § 34-4-16.5-3(7) (Supp. 1980) which is currently codified at IND. CODE § 34-4-16.5-3(7) (1982)).

³⁶431 N.E.2d at 539.

able to deny the employer/employee relationship to the extent that it might produce liability and to invoke the employer/employee relationship to the extent that it would enable Sports, Inc. to escape liability. This is rather unusual in light of the normal effect of the doctrine of respondeat superior. Suffice it to say that Sports, Inc. benefited from a classic example of being given its cake and being allowed to eat it, too.

Following close on the heels of *Sports, Inc.*, the first district court of appeals found a duty to control the actions of a third person in *Martin v. Shea*.³⁷ *Martin* is perhaps the most significant and certainly the most startling case decided during the survey period. In *Martin*, the court held that a social guest injured by another guest at a swimming party stated a claim against the homeowner sufficient to withstand a motion to dismiss.³⁸

The Martins attended a pool party at the home of the Sheas in June of 1979. Although Martin did not participate, some of the guests took part in "horse play" around the pool, and one of the guests struck Martin from behind. Martin fell into the pool and struck his head on the bottom. The fall injured Martin severely, and he sued the Sheas claiming that the host had a duty to control the conduct of those using the premises. The Sheas filed a motion to dismiss that was granted and Martin appealed. The court of appeals reversed and remanded.³⁹

The *Martin* court noted that there was a tendency to classify this case among the long line of premises liability cases,⁴⁰ but the court refused to yield to such a classification. Rather, the court found that premises liability cases generally involve injuries caused by physical defects in the land, and the injury in this case was not a result of such a physical defect.⁴¹ Therefore, the court in *Martin* concluded that imposing a duty only according to the plaintiff's status as business invitee, licensee or trespasser would be inappropriate.⁴² Thus, it did not matter that Martin, as a social guest, would have been a licensee under the premises liability classification system. Unfortunately, the court cited no authority and did not give a satisfactory reason why such a distinction should be made between injuries resulting from dangerous conditions on the property and injuries resulting from dangerous activities on the property. If, as the dissent suggests, the

³⁷432 N.E.2d 46 (Ind. Ct. App. 1982).

³⁸*Id.* at 49. *Martin v. Shea* was handed down just a week after *Sports, Inc. v. Gilbert*. Not surprisingly, Judge Neal, the writing judge in *Sports, Inc.*, dissented in *Martin v. Shea*.

³⁹432 N.E.2d at 47. The defendant's original motion to dismiss was denied, but upon reconsideration the trial court granted it.

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.*

reason for finding a lesser duty owed to a licensee in a premises liability case is that "[t]he licensee has no right to demand that the occupier change his method of conducting activities for his safety,"⁴³ then there seems to be no good reason for distinguishing between types of dangers.

Though considerable criticism has been levelled against the entire concept of the classification system in premises liability,⁴⁴ it has generally been based on the rigidity and arbitrariness of the categories.⁴⁵ Perhaps the best approach would be to abolish the classification system altogether as a number of jurisdictions have done⁴⁶ rather than to carve out ill-considered exceptions as the court did in *Martin*.

Having resisted any urge to classify this as a premises liability case, the *Martin* court moved to the question of the nature of the duty owed to Martin. Noting that duties may arise out of knowledge of certain situations and that a court may create a duty to fit the circumstances,⁴⁷ the court proceeded to fashion a duty to fit the circumstances of this case. The court focused on whether a host at a swimming party has a duty to control the conduct of one guest to prevent injury to another guest and concluded that the answer is yes. However, after making a point to remove this case from the area of premises liability, the court used premises liability cases to support its imposition of a duty in *Martin*.⁴⁸

⁴³*Id.* at 51 (Neal, J., dissenting) (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 60 at 380 (4th ed. 1971)).

⁴⁴See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 62 (4th ed. 1971); F. HARPER & F. JAMES, THE LAW OF TORTS § 27.1-27.14 (1956); C. MORRIS & C. MORRIS, MORRIS ON TORTS 139 (2d ed. 1980); Note, *Tort Liability of Owners and Possessors of Land—A Single Standard of Reasonable Care under the Circumstances Toward Invitees and Licensees*, 33 ARK. L. REV. 194 (1979); Comment, *The Common Law Tort Liability of Owners and Occupiers of Land: A Trap for the Unwary?*, 36 MD. L. REV. 816 (1977); Comment, *Torts—Abolition of the Distinction Between Licensees and Invitees Entitles all Lawful Visitors to a Standard of Reasonable Care*, 8 SUFFOLK U.L. REV. 795 (1974).

⁴⁵See, e.g., W. PROSSER, *supra* note 44, § 58, 62 at 357, 398-99.

⁴⁶See *id.* § 62.

⁴⁷432 N.E.2d at 48 (citing *Snyder v. Mouser*, 149 Ind. App. 334, 272 N.E.2d 627 (1977)).

⁴⁸432 N.E.2d at 48-49. The court first cited *Glen Park Democratic Club, Inc. v. Kylsa*, 139 Ind. App. 393, 213 N.E.2d 812 (1966). *Glen Park* involved a patron at a bar who was injured by other patrons. The case was obviously decided on the basis of a premise liability theory and turned upon the fact that the plaintiff was a business invitee. The court also cited *Cory v. Ray*, 115 Ind. App. 50, 55 N.E.2d 117 (1944) in which it was held that the operator of a place of public entertainment may be held liable for injuries to his patrons if reasonable care is not taken to keep the premises safe. The only case cited by the court that stands squarely for the proposition asserted here is the New York case *Majjione v. Dimino*, 39 A.D.2d 128, 332 N.Y.S.2d 683 (1972). Although this case is factually close to *Martin*, it obviously has no mandatory precedential effect.

The *Martin* court also referred to the distinction made in some jurisdictions between conditions of the premises and conduct of the defendant as one between passive negligence on the one hand and active negligence on the other.⁴⁹ The former excuses liability, and the latter does not. However, presumably the former would fall into Indiana's well-established principles of premises liability in which the extent of a landowner's duty is based on the status of the plaintiff.

Additionally, the court pointed to the "general principles of law in regard to a duty to control conduct"⁵⁰ found in the *Restatement (Second) of Torts* section 318 which reads:

If the actor permits a third party person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so to control the conduct of the third person as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor (a) knows or has reason to know that he has the ability to control the third person, and (b) knows or should know of the necessity and opportunity for exercising such control.⁵¹

However, the court did not mention whether there was any indication that the defendant could have controlled the third person, that the defendant knew of the necessity for control, or that the defendant even knew who the third person was. The court apparently ignored the general common law principle which finds no duty to control the conduct of another. As the dissent aptly pointed out, normally such a duty only exists in the presence of a special relationship between defendant and plaintiff, or between defendant and the active tortfeasor.⁵² The relationship of host and social guest has not been one which has given rise to this duty in the past.⁵³ Following in the footsteps of *Estate of Mathes v. Ireland*,⁵⁴ the *Martin* court has greatly

⁴⁹432 N.E.2d at 49.

⁵⁰*Id.*

⁵¹RESTATEMENT (SECOND) OF TORTS § 318 (1965).

⁵²432 N.E.2d at 50 (Neal, J., dissenting) (citing *Sports, Inc. v. Gilbert*, 431 N.E.2d 534 (Ind. Ct. App. 1982) and RESTATEMENT (SECOND) OF TORTS § 315 (1965)). Judge Neal in his dissent pointed out a number of the weaknesses and inconsistencies in the majority's opinion, claiming that there is no reason in sense or law to distinguish this case from the traditional premises liability case. However, some of the authorities Judge Neal uses to support his position are no more germane to the situation in the present case than those used by the majority. *Swanson v. Shroat*, 169 Ind. App. 80, 345 N.E.2d 872 (1976) and *Pierce v. Walters*, 152 Ind. App. 321, 283 N.E.2d 560 (1972) do not deal with the problem of a landowner controlling the actions of another for the protection of a licensee. However, Judge Neal's opinion is certainly more in keeping with the traditional approach in the area.

⁵³432 N.E.2d at 50 (Neal, J., dissenting).

⁵⁴419 N.E.2d 782 (Ind. Ct. App. 1981).

enlarged the concept of duty to control the conduct of others in Indiana.

2. *Affirmative Duty Imposed by Gratuitous Undertaking.*—The court of appeals for the fourth district dealt with another aspect of the affirmative duty issue in *Board of Commissioners v. Hatton*.⁵⁵ The fourth district noted that Indiana has previously recognized that "a duty may be imposed upon one who by affirmative conduct or agreement assumes to act, even gratuitously, for another to exercise care and skill in what he has undertaken."⁵⁶ However, in *Hatton*, the court qualified this rule holding that "liability for nonfeasance in connection with a gratuitous or voluntary undertaking may arise only where beneficiaries have relied on its performance."⁵⁷

The plaintiff in *Hatton* was injured when her bicycle was struck by a truck, as the truck rounded a curve that was flanked by natural growth coming within six inches of the road and reaching a height of approximately ten feet. *Hatton* filed a complaint against the county alleging that its negligence in maintaining the growth around the curve failed to open the view of the curve in question and was thus the proximate cause of her injuries. The jury returned a verdict for *Hatton*, and the county appealed contending that *Hatton* failed to establish that the county had a duty to maintain the roadside. The court of appeals agreed and reversed the lower court decision.⁵⁸

In *Hatton*, the plaintiff argued that the county had both a common law and a statutory duty to keep the area adjacent to the road cleared.⁵⁹ She claimed the common law duty existed both because of the counties' maintenance of the area and because of a broader duty to protect the users of the highway from inherent dangers. The court of appeals did not reach the second contention because the plaintiff had not objected to the jury instruction which predicated the common law duty on *Hatton*'s ability to prove either that the county owned the adjacent land or had assumed responsibility for its maintenance. The plaintiff offered no evidence that the county owned the adjacent area, and the county had offered evidence to the effect that neither a record of ownership nor a description of the road itself could be

⁵⁵427 N.E.2d 696 (Ind. Ct. App. 1981).

⁵⁶*Id.* at 699 (citing *Clyde E. Williams & Assoc. v. Boatman*, 375 N.E.2d 1138 (Ind. Ct. App. 1978)).

⁵⁷427 N.E.2d at 700.

⁵⁸*Id.* at 703.

⁵⁹*Id.* at 703. The court agreed with the State's claim that the trial court should have granted the State judgment on the evidence on the issue of statutory duty. IND. CODE § 32-10-5-1 (1976), which imposes a duty to mow, requires grass to be cut to five feet. Because *Hatton*'s visibility would not have been improved even if the grass were cut to five feet, violation of the statute could not have been the proximate cause of the injury. 427 N.E.2d at 703.

found. Although the county policy was to mow a three-foot wide strip along the highway twice a year, residents testified that the growth had not been cut by anyone since 1972. This testimony, accepted by the plaintiff as fact, indicated that the county did *not* assume responsibility for maintenance of the area. The court pointed out that such evidence might show lack of due care if a duty existed, but the establishment of a legal duty must necessarily precede the issue of due care.⁶⁰

Although the court resolved the common law duty issue by finding no evidence that the county had assumed the responsibility to mow, the court qualified the rule pertaining to gratuitous assumption of responsibility. Looking to case law in other jurisdictions, the court concluded that "liability for non-feasance *in connection with* a gratuitous or voluntary undertaking may arise only where beneficiaries have relied on its performance."⁶¹ The testimony by residents that no one had mowed the roadside in at least seven years indicated that reliance was not present.

In *Perry v. NIPSCO*,⁶² the court of appeals for the fourth district may have enlarged the perimeters of the affirmative duty to come to the aid of another. NIPSCO entered into a contract with Babcock & Wilcox Company (B. & W.) for the construction of equipment at NIPSCO's Michigan City generating station. In April of 1972, a B. & W. foreman ordered Perry, a B. & W. employee, to do some welding twenty feet above ground. No scaffolding or other safety equipment was available. Perry complained to his B. & W. foreman and to a NIPSCO employee standing nearby. The NIPSCO man told Perry he had no control over what Perry did for B. & W. Perry ultimately attempted to do the job, fell, and was seriously injured. Perry sued NIPSCO for personal injuries claiming that NIPSCO owed a duty to exercise reasonable care relative to job safety, and the trial court granted NIPSCO's motion for summary judgment. Perry appealed, and the court of appeals reversed on the issue pertaining to NIPSCO's assumption of job site safety.⁶³

The court of appeals began its analysis of the duty question by stating that in this area the general rule is that liability for the acts of another normally does not apply in the absence of a master-servant relationship.⁶⁴ The court then quoted at length from the venerable case

⁶⁰427 N.E.2d at 700.

⁶¹*Id.* (emphasis in original) (citing *Chisolm v. Stephens*, 47 Ill. App. 3d 999, 365 N.E.2d 80 (1977); *Johnson v. Souza*, 71 N.J. Super. 240, 176 A.2d 797 (App. Div. 1961); *Florence v. Goldberg*, 44 N.Y.2d 189, 375 N.E.2d 763, 404 N.Y.S.2d 583 (1978)).

⁶²433 N.E.2d 44 (Ind. Ct. App. 1982).

⁶³*Id.* at 50.

⁶⁴*Id.* at 46.

*Prest-O-Lite Co. v. Skeel*⁶⁵ apparently to find that B. & W. was an independent contractor rather than an employee.⁶⁶ However, the court recognized that several exceptions have evolved to the general nonliability of independent contractors.⁶⁷ The plaintiff in *Perry* claimed that two of these exceptions applied in the instant case because the contract required performance of intrinsically dangerous work, and NIPSCO was charged by contract with providing safety on the job.⁶⁸

The court found that the first exception asserted by plaintiff did not apply because "an undertaking is not intrinsically dangerous if the 'risk of injury involved in its use can be eliminated or significantly reduced by taking proper precautions.'"⁶⁹ Here, the use of scaffolding would have greatly reduced the potential for injury.

Based on the mandate from *Prest-O-Lite* that contracts be read as a whole in order to glean their "spirit and essence", the NIPSCO court further found that the contract between NIPSCO and B. & W. read as a whole did not reserve to NIPSCO the control of job site safety for B. & W.'s employees.⁷⁰

Plaintiff, relying on *Mullins v. Easton*,⁷¹ claimed that NIPSCO as owner of the property was required to provide a safe place for Perry to work. The court distinguished the *Mullins* case on its facts. In *Mullins*, the plaintiff was injured by a defect in the property itself, whereas here, plaintiff's injury had nothing to do with the condition of the property. Thus NIPSCO, as owner of the property, breached no duty to Perry.⁷²

Though the court rejected Perry's arguments regarding NIPSCO's responsibility to the employee of a subcontractor and acknowledged the general rule that there is no duty to protect or aid others even if the actor should or does realize such action is necessary, the court did rule that "one who assumes supervision of safety at a construction site has a duty to use due care in the enforcement of safety regulations."⁷³ Here, the court found a special relationship between

⁶⁵182 Ind. 593, 106 N.E. 365 (1914) (contractor's worker was injured when building owned by Prest-O-Lite Co. collapsed; the court concluded that Prest-O-Lite was not liable because the contractor was found to be an independent contractor).

⁶⁶433 N.E.2d at 47. The court made no specific preliminary statement that B. & W. was an independent contractor, but it is obvious that the opinion was based on that assumption. Perhaps the parties stipulated to that fact in their briefs.

⁶⁷*Id.* (quoting *Denneau v. Indiana & Michigan Elec. Co.*, 150 Ind. App. 615, 620, 277 N.E.2d 8, 12, (1971)).

⁶⁸433 N.E.2d at 47.

⁶⁹*Id.* (quoting *Hale v. Peabody Coal Co.*, 168 Ind. App. 336, 343, 343 N.E.2d 316, 322 (1976)).

⁷⁰433 N.E.2d at 48.

⁷¹376 N.E.2d 1178 (Ind. Ct. App. 1978).

⁷²433 N.E.2d at 49.

⁷³*Id.* (construing *Clyde E. Williams & Assoc. v. Boatman*, 375 N.E.2d 1138 (Ind.

NIPSCO and B. & W. regarding the safety of B. & W.'s employees. By holding safety meetings and by having employees who gave the appearance of supervising safety on the site, NIPSCO had "assumed the obligation to enforce safety measures."⁷⁴

In reaching its conclusion, the court quoted the *Restatement (Second) of Torts* section 324A, which states in pertinent part:

One who undertakes, gratuitously . . . to render services to another which he should recognize as necessary for the protection of a third person . . . is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

. . . .

(b) he has undertaken to perform a duty owed by the other to the third person⁷⁵

In light of NIPSCO's assumption of B. & W.'s obligation to monitor safety at the job site, the court had no trouble in finding that section 324A applied.

Although the court in *NIPSCO* stated that the duty set out in section 324A is nothing new in our law,⁷⁶ it appears that after *NIPSCO*, the limits of the affirmative duty to act in Indiana are those defined in section 324A of the *Restatement (Second) of Torts*. The court quoted *Board of Commissioners v. Hatton* as authority for the general proposition that Indiana recognizes duties imposed by assuming to act for another,⁷⁷ but the court in *NIPSCO* made no reference to the *Hatton* court's nonfeasance qualification to that rule. The fourth district court's adoption of section 324A may mean that subsection (b), dealing with the reliance factor, will supplant the nonfeasance/misfeasance distinction found in *Hatton*.

B. Proximate Cause

In *Bridges v. Kentucky Stone Co.*,⁷⁸ the Indiana Supreme Court dealt with that elusive concept, proximate cause. The plaintiff in *Bridges* was injured and his minor son killed in an explosion of a bomb at his residence. The bomb was made from explosives stolen from the

Ct. App. 1978) where court found that if engineering firm assumed the supervision of safety at a construction site, a relationship would exist that would create a duty to supervise the project in the manner of a reasonably prudent man).

⁷⁴433 N.E.2d at 49 (emphasis in original).

⁷⁵*Id.* at 50 (quoting RESTATEMENT (SECOND) OF TORTS § 324A (1966)).

⁷⁶433 N.E.2d at 50 (citing *Nelson v. Union Wire Rope Corp.*, 31 Ill. 2d 69, 199 N.E.2d 769 (1964)).

⁷⁷433 N.E.2d at 50 (quoting *Board of Comm'r's v. Hatton*, 427 N.E.2d 696 (Ind. Ct. App. 1981)). For a discussion of *Hatton* see *supra* notes 55-61 and accompanying text.

⁷⁸425 N.E.2d 125 (Ind. 1981), *rev'd* 408 N.E.2d 575 (Ind. Ct. App. 1980).

defendant's plant. Bridges sued, claiming that the defendant negligently stored the dynamite so that it could be stolen and that this negligent act was the proximate cause of his damage. The trial court granted the defendant's motion for summary judgment holding as a matter of law that negligent storage of the dynamite was not the proximate cause of plaintiff's injuries.⁷⁹ The court of appeals for the fourth district reversed the trial court decision. In reviewing the legislative history and statutory purposes of federal laws controlling storage of explosives, the court of appeals found that "reasonable minds could differ as to whether the defendants reasonably should have foreseen that negligent storage of dynamite could result in its theft and misuse."⁸⁰ The Indiana Supreme Court granted the defendant's petition for transfer, vacated the decision of the court of appeals, and reinstated the trial court's decision to grant the defendant's motion for summary judgment.⁸¹

The supreme court noted the great disparity in approaches to the proximate cause question in cases involving the storage of explosives⁸² and cited as examples of the divergent points of view, *Bottorff v. South Construction Co.*⁸³ and *Yukon Equipment, Inc. v. Firemen's Fund Insurance*.⁸⁴ In *Bottorff*, a fourteen-year-old child stole explosives from a dilapidated shed and gave them to a twelve-year-old who injured himself. The Indiana Supreme Court sustained a demurrer in *Bottorff* finding that the larceny of the child, not the negligent storage, caused the injury.⁸⁵ By contrast, in *Yukon Equipment*, when extensive damage was done to neighboring homes because thieves broke into the defendant's magazine and ignited great quantities of dynamite, the Alaska Supreme Court found the defendant absolutely liable based on the court's conclusion that storing explosives is an ultrahazardous activity.⁸⁶

The supreme court in *Bridges* disagreed with the Alaska court's conclusion in *Yukon Equipment* that storing dynamite is an ultrahazardous activity that should result in a per se rule of liability.⁸⁷ Instead, the court adopted the *Restatement (Second) of Torts* section 520 approach⁸⁸ and concluded that the question of whether storage of

⁷⁹*Id.* at 126.

⁸⁰408 N.E.2d 575, 578 (Ind. Ct. App. 1980).

⁸¹425 N.E.2d at 125.

⁸²*Id.* at 126.

⁸³184 Ind. 221, 110 N.E. 977 (1916).

⁸⁴585 P.2d 1206 (Alaska 1978).

⁸⁵184 Ind. at 227-28, 110 N.E. at 978.

⁸⁶585 P.2d at 1211.

⁸⁷425 N.E.2d at 126.

⁸⁸RESTATEMENT (SECOND) OF TORTS § 520 (1977) reads in pertinent part:

In determining whether an activity is abnormally dangerous, the follow-

dynamite is an ultrahazardous activity should be determined on a case-by-case basis.⁸⁹

Unfortunately, the court in *Bridges* dropped its discussion of "ultrahazardous activities" without any statement as to whether the storage of dynamite in this case amounted to an ultrahazardous activity. Apparently, the court concluded that it did not because the court moved to a discussion based on a theory of negligence.⁹⁰

Although unwilling to accept that storing dynamite will always result in liability if someone steals and misuses it, the *Bridges* court expressed dissatisfaction with the approach in *Bottorff* also. The court pointed out that since the *Bottorff* decision, there have been extensive regulations enacted regarding the storage of explosives.⁹¹ This is indicative of a policy to encourage care. Thus, the court declined to follow the holding in *Bottorff* that the theft of explosives would always be a superseding cause which would relieve one who negligently stored them of liability.⁹² Rather, the court looked to the particular

ing factors are to be considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.

⁸⁹425 N.E.2d at 126. The court apparently assumed that if the activity is deemed ultrahazardous so as to justify the imposition of strict liability, the issue of proximate cause is no longer relevant. A logical argument can be made for the view that for strict liability to apply, the activity must be so hazardous and likely to cause harm that the foreseeability aspect of proximate cause as a limitation on liability is unnecessary. However, courts regularly interject limitations on strict liability on the basis of something in the nature of proximate cause. This is particularly true if an intervening cause, such as the act of a third person, plays a part in plaintiff's damage. Although extensively discussed by legal scholars, the problem has never been satisfactorily resolved. One noted torts scholar stated that, "[i]t is stuff like this that drives a torts professor mad and which convinces his students at the threshold of their professional training that the law is a crazy mess." Gregory, *Trespass to Negligence to Absolute Liability*, 37 V.A. L. REV. 359, 379 (1951). For various approaches to the problem see J. FLEMING, THE LAW OF TORTS 311-13 (3d ed. 1965); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 79 (4th ed. 1971); Harper, *Liability Without Fault and Proximate Cause*, 30 MICH. L. REV. 1001 (1932).

⁹⁰425 N.E.2d at 127. Having adopted section 520 as the proper approach to a case involving the storage of dynamite, the court defers to the trial court for a determination on the issue of whether the storage here constituted an ultrahazardous activity. See RESTATEMENT (SECOND) OF TORTS § 520 comment 1 (1977).

⁹¹425 N.E.2d at 127 (citing IND. CODE § 22-11-13-1 to -28 (1976)).

⁹²425 N.E.2d at 127.

facts of this case to determine that the trial court's grant of summary judgment on the issue of proximate cause was correct.

The relevant factors acting as a superseding cause precluding liability of the defendant in *Bridges* were that the blast occurred nearly three weeks subsequent to the theft, that the blast occurred at a location over one hundred miles from the storage site, and that the disappearance of the dynamite was reported to federal authorities pursuant to federal regulations.

In *Bridges*, the court recognized that negligence is the proximate cause of injury if it is a natural and probable consequence that should have been foreseen. Given the factual situation in *Bridges*, the court found that reasonable minds could not differ on the question of whether the damage to plaintiff was reasonably foreseeable.⁹³ However, in light of the likelihood of injury when explosives are stolen and misused, it is difficult to imagine how reasonable minds might not differ on the question of whether negligent storage and the resulting theft of explosives could foreseeably result in the thief making and exploding bombs regardless of how much later or how far away the explosion. Perhaps the court felt a bit uncomfortable with its decision because the court expressly limited the decision in *Bridges* to the facts,⁹⁴ making it difficult to assess the future impact of this case.⁹⁵

The court of appeals for the second district had occasion to explore the vagaries of proximate cause in *Hiatt v. Brown*.⁹⁶ In *Hiatt*, a jet blast from a TWA airplane blew the plaintiff down as she walked up a ramp at Indianapolis International Airport.

In 1964, the Indianapolis Airport Authority (IAA) had contracted with defendant Brown, an architect, to design a plan for the expansion of the airport's terminal building. The expansion plan included a TWA arrival/departure gate near the ramp on which *Hiatt* was injured. The original understanding between the parties was that all airlines would use a nose in/nose out system of moving planes. With this system, the planes kept their engines off, and tugs pushed the planes in and pulled them out. In 1965, Brown learned that TWA intended to use a taxi in/taxi out operation which would subject the unprotected ramps to jet blasts from the arriving and departing planes. Although it was unclear whether Brown learned of this change before or after he submitted his architectural plans for approval, the record indicated he had time to make design changes during the construction.

⁹³*Id.*

⁹⁴*Id.*

⁹⁵Justice DeBruler in his short dissenting opinion expressed the view that what happened here could have been foreseen and a jury question was presented. *Id.* at 128 (DeBruler, J., dissenting).

⁹⁶422 N.E.2d 736 (Ind. Ct. App. 1981).

IAA accepted the completed terminal in 1967 with no jet blast protection for the ramp. Though numerous incidents of property and personal injury occurred, neither TWA nor IAA acted to warn pedestrians on the ramp of the possible danger.

Hiatt filed suit against Brown, TWA, and IAA. TWA and IAA settled, and Hiatt went to trial against Brown. The trial court granted Brown's motion for summary judgment on the ground that Brown was relieved from liability because the conduct of IAA and TWA intervened to break the causal chain between Brown's negligence and Hiatt's injury.⁹⁷ When Hiatt appealed, the court of appeals reversed the entry of summary judgment finding that a genuine issue of material fact existed on the question of whether Hiatt's injuries were proximately caused by Brown's negligence.⁹⁸

Before considering the proximate cause issue, the court addressed the question of whether the *Restatement (Second) of Torts* section 385 should apply to relieve Hiatt from having to establish privity between herself and Brown even though Hiatt was a stranger to the architect/owner relationship.⁹⁹ The court briefly traced the downfall of the privity requirement in contractor-owner relationships in numerous jurisdictions¹⁰⁰ and finally pointed out that section 385 reflects this trend. Although a fair reading of the case makes it appear as if the court's ultimate destination was to specifically adopt section 385 as law in Indiana, the court concluded that it did not need to adopt or reject section 385 to resolve this case. The court found that Hiatt's situation fell within an already well-recognized exception to the privity requirement in Indiana which applies if "the architect's design was done so negligently as to create a condition imminently dangerous to third persons."¹⁰¹ Thus, even though the court in *Hiatt* decided not

⁹⁷*Id.* at 738. As an alternative reason for granting the summary judgment, the trial court found that Brown's negligence in failing to investigate or design jet blast protection merely created a condition which made plaintiff's injury possible and that the conduct of TWA and IAA actually caused the injury. *Id.* However, the court on appeal did not address this conclusion.

⁹⁸*Id.* at 739.

⁹⁹RESTATEMENT (SECOND) OF TORTS § 385 (1965) provides:

One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as manufacturer or independent contractor makes a chattel for the use of others.

¹⁰⁰See generally Comment, *Architect Tort Liability in Preparation of Plans and Specifications*, 55 CALIF. L. REV. 1361 (1967); Note, *Liability of Design Professionals—The Necessity of Fault*, 58 IOWA L. REV. 1221 (1973).

¹⁰¹422 N.E.2d at 740. One might take issue with the court's assertion that in Indiana the privity barrier has "repeatedly collapsed" in the situation of architects who have

to take the final step to adopt section 385 as law, nonetheless, the court laid the groundwork for the adoption of section 385 should the appropriate occasion arise.

After disposing of the privity issue, the court in *Hiatt* focused its consideration on the proximate cause question and inquired whether the conduct of TWA and IAA, in recognizing the danger and failing to rectify or warn of it, was an intervening cause which would relieve Brown of liability.¹⁰² Although the court recognized the policy behind the rule that the conduct of an owner who learns of a dangerously defective condition on his land but fails to remedy it is an intervening cause which excuses an architect from liability,¹⁰³ the court, nevertheless, noted that "reasonable foreseeability is still the fundamental test of proximate cause" and that intervening causes will excuse liability only if they are not foreseeable.¹⁰⁴ The question in *Hiatt* was whether Brown should have foreseen that TWA and IAA would recognize the danger and fail to remedy it. Because the appellate court found conflicting facts and inferences to be drawn from the record on this question, it concluded that resolution of this issue should have been left to the trier of fact and the trial court's grant of summary judgment was reversible error.¹⁰⁵

C. Damages

1. *Crops.*—In *Decatur County Ag-Services, Inc. v. Young*,¹⁰⁶ the Indiana Supreme Court granted transfer to settle the method for measuring damages for the destruction of growing crops having no ready market value. The plaintiff Young's soybean crop was partially destroyed as a result of defendant's negligent spraying for grass-

designed hazardous structures in light of the fact that all the cases cited by the court involve contractors sued for negligent construction defects and not architects sued for negligent design defects. The cases cited are: *Davis v. Henderlong Lumber Co.*, 221 F. Supp. 129 (N.D. Ind. 1963); *Gillam v. J. C. Penney Co.*, 193 F. Supp. 558 (S.D. Ind. 1961); *Great Atlantic & Pacific Tea Co. v. Wilson*, 408 N.E.2d 144 (Ind. Ct. App. 1980); and *Holland Furnace Co. v. Nauracaj*, 105 Ind. App. 574, 14 N.E.2d 339 (1938). Arguably, however, the reason for holding architects liable for negligent design in the absence of privity is even stronger than that for holding contractors liable. In the cases cited by the court, the contractors were merely following designs and specifications drafted by someone else. The architect here, however, possibly created in his design "a condition imminently dangerous to third persons." 422 N.E.2d at 740.

¹⁰²422 N.E.2d at 740-42.

¹⁰³*Id.* at 740. Such a rule is necessary to protect an architect or builder who has turned property over to an owner and no longer has the ability to modify the structure. If such a principle did not apply, architects would remain liable to third persons with no power to cure the defect.

¹⁰⁴*Id.* at 741.

¹⁰⁵*Id.* at 741-42.

¹⁰⁶426 N.E.2d 644 (Ind. 1981).

hoppers. After harvest, Young, as was his custom, stored what was left of his beans and sold them after the planting period the next year for \$8.86 to \$10.39 per bushel. The trial court awarded Young damages of \$10 per bushel for the difference between what his crop would have yielded and what it did yield based on the market value at the time he actually sold what remained of his crop. Defendant appealed claiming, among other things, that the trial court erred in assessing the value of the lost portion at the market price at the time Young sold the crop rather than at the prevailing market price at the time of harvest, and that the trial court erred in failing to reduce the award by the amount Young saved by not having to harvest, cultivate, or store the lost portion of the crop. The court of appeals for the first district affirmed the damages awarded.¹⁰⁷ The supreme court granted transfer on the ground that the court of appeals decided erroneously a new question of law.¹⁰⁸

Quoting a Wisconsin case and citing authorities from numerous other jurisdictions, the supreme court found that the proper measure of damages for the destruction or partial destruction of a growing crop to be "the difference between the value at maturity of the probable crop if there had been no injury and the value of the actual crop at maturity, less the expense of cultivation, harvesting and marketing that portion of the probable crop which was prevented from maturing."¹⁰⁹ In adopting this method of valuation, the court fell in line with the approach used in a majority of jurisdictions.¹¹⁰

However, the circumstances of this case illustrate the difficulties and possible inequities created by adhering to a hard-and-fast rule in the area of calculating damages for injuries to crops. The court in *Young* aptly pointed out that the purpose of damages is to compensate the injured party for loss.¹¹¹ The court further stated, though, that the plaintiff, by electing not to sell at the harvest time, speculated that the market value would be greater at a later date, and "[s]peculation about lost profits of this nature is not permitted."¹¹²

If the purpose of damages is to compensate the injured party for loss suffered, the remedy failed in this case. The plaintiff in *Young* actually sold part of his crop at a later time because it was his custom,

¹⁰⁷401 N.E.2d 731 (Ind. Ct. App. 1980).

¹⁰⁸426 N.E.2d at 645.

¹⁰⁹*Id.* at 646 (quoting *Cutler Cranberry Co. v. Oakdale Electric Cooperative*, 78 Wis. 2d 222, 229, 254 N.W.2d 234, 238 (1977)).

¹¹⁰See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 5.2 (1973). For a discussion of the seemingly infinite variety of methods for assessing damages to growing crops, see Note, *Markets, Time, and Damages: Some Unsolved Problems in the Field of Crops*, 14 IND. L. REV. 647 (1981).

¹¹¹426 N.E.2d at 646.

¹¹²*Id.* at 647.

and he would have sold the entire crop at this later date had it not been damaged by the defendant. The amount of plaintiff's actual loss was thus easily ascertainable; the formula was the difference between what he received when he sold and what he would have received had he been able to sell the entire crop. The practice of selling the crop at a later time may have appeared speculative to the court, but, for this particular plaintiff, evidence could have been introduced to show that selling late constituted an established business practice. Thus, damages calculated at the time of the actual sale would have been more commensurate with this plaintiff's loss.

To avoid the inequities that occurred in *Young*, a few courts have adopted a case-by-case approach in determining damages.¹¹³ A flexible rule that allows plaintiff and defendant to introduce evidence on the extent of the plaintiff's actual losses has obvious appeal if compensation for the loss suffered is the ultimate goal.¹¹⁴ However, the supreme court, by opting in favor of the majority rule, has foreclosed this as a possibility in Indiana.

2. *Nuisance*.—The first district court of appeals held in *Rust v. Guinn*¹¹⁵ that damages for personal losses, such as inconvenience and injury to health, may be recovered in an action for an abatable private nuisance. This would be in addition to damages for the interference with and loss of use and enjoyment of property. The Guinns had resided on an eighty-acre farm for four years prior to the establishment of two chicken farms on an adjacent property. Because of the proximity of the chicken farms, the Guinns suffered an increased number of flies and repugnant odors. The Guinns brought suit against Eggacres, Inc. (Eggacres) and were awarded \$9,500 in the second part of a bifurcated proceeding. Eggacres appealed from the judgment in the damages suit assigning as error the trial court's jury instruction on the measure of damages for an abatable private nuisance.¹¹⁶

Eggacres contended that the proper measure of damages for an abatable private nuisance is limited to the reduction in the fair rental value of plaintiff's real estate caused by the nuisance conditions. The trial court instructed the jury it could include not only the damage elements agreed to by Eggacres but also damages for actual expenses incurred by plaintiff in attempting to mitigate the effects of the nuisance and damages for injury to health caused by the nuisance.

Although the court of appeals noted that recent Indiana cases have held that the general measure of damages for an abatable private

¹¹³See D. DOBBS, *supra* note 110.

¹¹⁴See *supra* note 110 for discussion of this approach.

¹¹⁵429 N.E.2d 299 (Ind. Ct. App. 1981).

¹¹⁶*Id.* at 301.

nuisance is the loss of the use of the land, measured by the diminution in rental value, the court found no Indiana cases which excluded other items of damage.¹¹⁷ Nor did the court find that the legislature gave any guidance on the damages issue in the statutes dealing with nuisance.¹¹⁸ However, intent on expanding the scope of damages recoverable for a private abatable nuisance, the court recognized that a plaintiff in a nuisance action often suffers damages beyond diminution in rental value.¹¹⁹ To support its position, the court cited authority from other jurisdictions,¹²⁰ the *Restatement (Second) of Torts* section 929(1),¹²¹ and Dean Prosser,¹²² as well as dicta from a vintage Indiana

¹¹⁷*Id.* at 303.

¹¹⁸See IND. CODE §§ 34-1-52-1 to -3 (1976). These sections define nuisance, identify the proper party to bring suit, and state possible remedies. These statutes are silent, however, on what items of damages are recoverable. *Id.*

¹¹⁹429 N.E.2d at 303.

¹²⁰*Id.* at 304 (citing City of San Jose v. Superior Court of Santa Clara County, 12 Cal. 3d 447, 525 P.2d 701, 115 Cal. Rptr. 797 (1974); Miller v. Carnation Co., 39 Colo. App. 1, 564 P.2d 127 (1977); Nair v. Thow, 156 Conn. 445, 242 A.2d 757 (1968); Nitram Chemicals, Inc. v. Parker, 200 So. 2d 220 (Fla. Dist. Ct. App. 1967); Pollard v. Land West, Inc., 96 Idaho 274, 526 P.2d 1110 (1974); Earl v. Clark, 219 N.W.2d 487 (Iowa 1974); Holmberg v. Bergin, 285 Minn. 250, 172 N.W.2d 739 (1969); Nevada Cement Co. v. Lemler, 89 Nev. 447, 514 P.2d 1180 (1973); Spencer Creek Pollution Control Ass'n v. Organic Fertilizer Co., 264 Or. 557, 505 P.2d 919 (1973); Hendrix v. City of Maryville, 58 Tenn. App. 457, 431 S.W.2d 292 (1968); Lacy Feed Co. v. Parrish, 517 S.W.2d 845 (Tex. Civ. App. 1974)).

¹²¹429 N.E.2d at 303-04 (citing RESTATEMENT (SECOND) OF TORTS § 929(1) (1977)). The RESTATEMENT reads:

Harm to Land from Past Invasions

(1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for

(a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred,

(b) the loss of use of the land, and

(c) discomfort and annoyance to him as an occupant.

¹²²429 N.E.2d at 304 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 90, at 602-03 (4th ed. 1971)). PROSSER reads:

As in the case of any other tort, the plaintiff may recover his damages in an action at law. In such an action the principal elements of damages are the value attached to the use or enjoyment of which he has been deprived, or—which often amounts to a measure of the same thing—the loss of the rental or use value of the property for the duration of a temporary nuisance . . . and in addition the value of any personal discomfort or inconvenience which the plaintiff has suffered, or of any injury to health or other personal injury sustained by the plaintiff, or by members of his family so far as they affect his own enjoyment of the premises, as well as any reasonable expenses which he has incurred on account of the nuisance.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 90, at 602-03 (4th ed. 1971).

case¹²³ to the effect that courts are not restricted to depreciation of the property but might also consider a plaintiff's inconvenience and discomfort.

To Eggacres' contention that damages beyond diminution in rental value constituted a double recovery, the court responded simply by voicing its disagreement and referring to a Colorado case distinguishing between proprietary and personal losses and recognizing a need to recover for both.¹²⁴

Although the long-range impact of *Rust v. Guinn* cannot be ascertained yet, this decision, which broadens the scope of damages recoverable for abatable private nuisance, may encourage plaintiffs to bring nuisance actions.

D. Loss of Consortium

For the first time in Indiana, the issue of whether a noninjured spouse's cause of action for loss of consortium must be joined with the injured spouse's action for personal injuries was decided. In *Rosander v. Copco Steel & Engineering Co.*,¹²⁵ Rosander's husband was injured while working at Copco's plant. The injured spouse received worker's compensation benefits from Copco and executed a release of all claims against Copco. Subsequently, Mrs. Rosander, who was not a party to the release, filed a separate action against Copco for loss of consortium. The trial court granted a summary judgment in defendant Copco's favor, holding that because loss of consortium is a derivative suit, the settlement of the injured spouse's primary suit bars the maintenance of an independent suit by the noninjured spouse.¹²⁶

Although the court of appeals disagreed with the trial court's conclusion, it picked up the trial court's unfortunate use of the word "derivative" and stated that "[i]t cannot be denied that a claim for loss of consortium is derivative in that without an injury to one spouse, the other spouse would have no action."¹²⁷ That an action for loss of consortium by one spouse will not arise without negligent injury to the other spouse illustrates that the claim is for injury to a relational interest—the marriage relationship—not that it is a derivative

¹²³429 N.E.2d at 303 (quoting *Weston Paper Co. v. Pope*, 155 Ind. 394, 402-03, 57 N.E. 719, 721 (1900)).

¹²⁴*Id.* at 304 (citing *Miller v. Carnation Co.*, 39 Colo. App. 1, 564 P.2d 127 (1977)). The court neglects to point out that there is considerable authority for the proposition posited by Eggacres that recovery of personal damages amounts to double recovery. See generally D. DOBBS, *supra* note 110, § 5.3 and cases cited therein.

¹²⁵429 N.E.2d 990 (Ind. Ct. App. 1982).

¹²⁶*Id.* at 991.

¹²⁷*Id.*

action.¹²⁸ Nevertheless, the court of appeals recognized that an action for loss of consortium is an independent action that is separate and distinct from the injured spouse's action for personal injuries and that one spouse cannot waive the rights of the other.¹²⁹

Regardless of the independent status of an action for loss of consortium, the court considered whether the interests of judicial economy, the danger of double recovery, and the potential for inconsistent verdicts are sufficiently compelling reasons to justify a rule requiring mandatory joinder of the claim for loss of consortium with the personal injury claim.¹³⁰ The court cited *Troue v. Marker*,¹³¹ in which the Indiana Supreme Court first recognized a wife's claim for loss of consortium, and noted that though *Troue* did not specifically answer the joinder question, the case implied that separate and distinct actions may be filed separately.¹³² In addition, the court found that the *Troue* court settled the double recovery problem by holding that a wife cannot recover loss of support in an action for loss of consortium.¹³³ The court noted that the problem of inconsistent verdicts was not relevant to *Rosander*, because the husband had signed a release, and a release does not settle the merits of a claim.¹³⁴

To answer the remaining question regarding judicial economy, the court turned to the *Restatement (Second) of Torts* section 693 which requires joinder, unless joinder is not possible.¹³⁵ Situations which would make joinder impossible include the release of the claim by the injured spouse without knowledge of the other spouse, as hap-

¹²⁸Derivative can generally be defined as "[c]loming from another; taken from something preceding; secondary. That which has not its origin in itself, but owes its existence to something foregoing." BLACK'S LAW DICTIONARY 399 (rev. 5th ed. 1979). Derivative action is traditionally an action brought by one party on behalf of someone else as in the situation of a stockholders' derivative action in which the corporation is the real party in interest and the stockholder only a nominal plaintiff. See 12 WORDS & PHRASES *Derivative Action* 312 (West 1954 & Supp. 1982).

¹²⁹429 N.E.2d at 991.

¹³⁰*Id.*

¹³¹253 Ind. 284, 252 N.E.2d 800 (1969).

¹³²429 N.E.2d at 991.

¹³³*Id.*

¹³⁴*Id.*

¹³⁵RESTATEMENT (SECOND) OF TORTS § 693 (1977) states:

(1) One who by reason of his tortious conduct is liable to one spouse for illness or other bodily harm is subject to liability to the other spouse for the resulting loss of the society and services of the first spouse, including impairment of capacity for sexual intercourse, and for reasonable expense incurred by the second spouse in providing medical treatment.

(2) Unless it is not possible to do so, the action for loss of society and services is required to be joined with the action for illness or bodily harm, and recovery for loss of society and services is allowed only if the two actions are so joined.

pened in the instant case; the abatement of the impaired spouse's claim by death; or the barring of the action by a workers' compensation act.¹³⁶ By adopting the approach in section 693, the court of appeals has made an effort to balance the sometimes competing interests of judicial economy and individual rights. After *Rosander*, in order to protect against subsequent suits by spouses who are unaware of the settlement of the primary suit, the negligent party, before finalizing a settlement agreement, should notify the uninjured spouse regarding the pending settlement.

E. Seat Belt Defense

In *State v. Ingram*,¹³⁷ the Indiana Supreme Court granted transfer and vacated the opinion of the court of appeals. The supreme court found that the trial court had properly admitted a loan receipt agreement and that the court of appeals had incorrectly reversed on that basis.¹³⁸ In the course of its discussion of issues not addressed by the court of appeals, the supreme court took occasion to settle the question of whether the "seat belt defense" has any validity in Indiana.

In *Ingram*, the plaintiffs were injured when their car went into a ditch that was negligently maintained. The State had responsibility to maintain the ditch. The plaintiffs were not wearing seat belts at the time of the accident. On appeal, the State claimed that the trial court erred in refusing to give the jury the following instruction:

One who is injured is bound to exercise reasonable care and diligence to avoid loss or to minimize resulting damage. It is incumbent [sic] upon a person who is injured to use such means as are reasonable under the circumstances to avoid or to minimize the damage. If you find from a consideration of all the evidence that the using and fastening of seat belts would have avoided or minimized the resulting damage, then the person wronged cannot recover for any item of damage which could have been avoided, or minimized.¹³⁹

The State claimed that the instruction was justified because the evidence showed that plaintiffs' injuries would have been reduced if they had worn seat belts, and a defendant may "show in mitigation or reduction of damages any facts surrounding the injury complained of which tend to reduce the amount required for just compensation to the plaintiff."¹⁴⁰

¹³⁶*Id.* at comment g.

¹³⁷427 N.E.2d 444 (Ind. 1981).

¹³⁸*Id.* at 445.

¹³⁹*Id.* at 447.

¹⁴⁰*Id.*

The supreme court noted that the Indiana Court of Appeals had discussed this theory, commonly called the doctrine of avoidable consequences, in *Kavanagh v. Butorac*.¹⁴¹ Although in *Kavanagh*, the court of appeals found insufficient evidence to justify application of the doctrine, the *Kavanagh* court recognized that the doctrine might apply at "some future date and in some matter where the circumstances are clearer than in the instant case in showing that some part of the injury would not have occurred except for the fact that plaintiff failed to avoid the consequence of the tort by not fastening his seat belt."¹⁴²

In spite of the State's claim that the "future date" had arrived, the supreme court in *Ingram* refused to accept failure to fasten a seat belt as the kind of avoidable consequence that a defendant may show in mitigation of damages.¹⁴³ The court pointed out that the rule of avoidable consequences applies only to a plaintiff's conduct after the commission of the tort but while some damage might still be averted.¹⁴⁴ Because buckling or failing to buckle a seat belt must be accomplished before the tortious act occurs, the doctrine of avoidable consequences cannot logically include the seat belt defense.¹⁴⁵ In addition to finding logical inconsistency in including failure to wear a seat belt under the rubric avoidable consequences, the supreme court noted Indiana's traditional approach to limiting mitigation of damages to post-tort consequences.¹⁴⁶ Thus the court concluded that a defendant cannot successfully assert plaintiff's failure to wear seat belts as a way to reduce damages in a negligence action.¹⁴⁷

To buttress its conclusion, the supreme court pointed out that the Indiana legislature addressed the matter of seat belts for other purposes but has never imposed the duty on riders to wear seat belts.¹⁴⁸ Until a time when the legislature feels called upon to impose such a duty upon riders in automobiles, the position of the seat belt defense is settled in Indiana.

F. Medical Malpractice

During the survey period, both the first and the fourth district

¹⁴¹140 Ind. App. 139, 221 N.E.2d 824 (1966).

¹⁴²*Id.* at 149, 221 N.E.2d at 830.

¹⁴³427 N.E.2d at 447.

¹⁴⁴*Id.* at 448.

¹⁴⁵*Id.*

¹⁴⁶*Id.* But see Note, *Spier v. Barker*, 3 HOFSTRA L. REV. 883, 892-93 (1975).

¹⁴⁷427 N.E.2d at 448. But see Kircher, *The Seat Belt Defense—State of the Law*, 53 MARQ. L. REV. 172, 182-86 (1970); Comment, *Self-Protective Safety Devices: An Economic Analysis*, 40 U. CHI. L. REV. 421, 427-33 (1973).

¹⁴⁸427 N.E.2d at 448. For a discussion of the seat belt defense see Note, *The Seat Belt Defense: A Comprehensive Guide for the Trial Lawyer and Suggested Approach for the Courts*, 56 NOTRE DAME LAW. 272 (1980).

court of appeals had an opportunity to interpret portions of the Medical Malpractice Act. In *Carmichael v. Silbert*,¹⁴⁹ the first district court of appeals held that the Indiana Malpractice Act¹⁵⁰ does not violate the equal protection or due process clauses of the United States Constitution or the privileges and immunities clause of the Indiana Constitution.¹⁵¹ The Act provides that a medical malpractice action must be brought within two years from the alleged act, omission, or neglect while other tort actions for personal injuries need not be brought until two years after the cause of action has accrued.¹⁵²

Mrs. Carmichael underwent surgery for the removal of warts and tumors in February 1977 and again in March 1977 because of resulting complications. In February 1980 she filed a malpractice complaint against Dr. Silbert, claiming that she currently suffers from a nervous disorder which is a result of Dr. Silbert's treatment. Dr. Silbert filed a motion for preliminary determination of law, claiming that the complaint was filed after the statute of limitations had run and the plaintiff's claim therefore should be barred. The trial court granted Silbert's motion and Carmichael appealed on the ground that the statute of limitations in the Medical Malpractice Act is unconstitutional.

Carmichael argued that the statute of limitations embraced in the Medical Malpractice Act violates the equal protection clause of the fourteenth amendment because it treats victims of medical malpractice differently from victims of other tortious acts. The statute of limitations provides that:

No claim, whether in contract or tort may be brought against a health care provider based upon professional services or health care rendered or which should have been rendered unless filed within two (2) years from the date of the alleged act, omission or neglect except that a minor under the full age of six years shall have until his eighth birthday in which to file. This section applies to all persons regardless of minority or other legal disability.¹⁵³

The basis of Carmichael's claim was that the Medical Malpractice Act requires the filing of a claim within two years of the act, omission, or neglect complained of, whereas the general statute of limitations provides that actions for personal injuries must be brought within two

¹⁴⁹422 N.E.2d 1330 (Ind. Ct. App. 1981).

¹⁵⁰IND. CODE § 16-9.5-3-1 (1976).

¹⁵¹422 N.E.2d 1330 (Ind. Ct. App. 1981).

¹⁵²IND. CODE § 16-9.5-3-1 (1976).

¹⁵³*Id.*

years after the accrual of the action.¹⁵⁴ Because neither a fundamental right nor a suspect classification was at issue in *Carmichael*, strict judicial scrutiny was not required.¹⁵⁵ Only a fair and substantial relationship between the classification and the legislative purpose must be present. The court of appeals found that the legislative classifications were rationally related to maintaining the availability of sufficient medical treatment in the state.¹⁵⁶ Thus, the statute does not violate equal protection.

Carmichael also argued that the two-year time period violates due process because it may not be possible to ascertain the full extent of injury, including the possibility of recurrence or permanency, until after the two-year period.¹⁵⁷ However, the court pointed out that in this case Mrs. Carmichael was aware of her alleged injuries soon after they occurred, and she had failed to take proper steps to bring her claim. In view of the 1980 Indiana Supreme Court decision of *Johnson v. St. Vincent Hospital, Inc.*,¹⁵⁸ which upheld the Act's constitutionality against multiple attacks, it is likely that the *Carmichael* court's decision would have been the same no matter when the injuries were discovered.

The court of appeals also relied on *Johnson v. St. Vincent Hospital, Inc.*, in holding that the statute of limitations provision does not violate article I, section 23 of the Indiana Constitution.¹⁵⁹ The burdens on malpractice claimants and the benefits granted to health care providers were deemed consistent with the legislative goal of maintaining health care services.¹⁶⁰ Therefore, the statute of limitations of the Medical Malpractice Act has withstood constitutional challenge and those who cannot or do not comply with its provisions will be barred from bringing an action.

In *Kranda v. Houser-Norberg Medical Corp.*,¹⁶¹ the court of appeals for the fourth district rendered a statutory interpretation of several provisions of the Medical Malpractice Act. Kranda brought suit against Dr. Houser and his medical corporation because Kranda suffered a rectal fistula following Dr. Houser's excision of a Bartholin cyst. The jury returned a verdict for Dr. Houser from which Kranda appealed.¹⁶²

¹⁵⁴422 N.E.2d at 1332 (quoting IND. CODE § 16-9.5-3-1 (1976), now codified at *id.* § 16-9.5-3-1 (1982), and citing IND. CODE § 34-1-2-2 (1982)).

¹⁵⁵422 N.E.2d at 1332.

¹⁵⁶*Id.* at 1333.

¹⁵⁷*Id.*

¹⁵⁸404 N.E.2d 585 (1980). For discussion of this case, see Harrigan, *Torts, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 425 (1982).

¹⁵⁹422 N.E.2d at 1333-34.

¹⁶⁰*Id.* at 1334.

¹⁶¹419 N.E.2d 1024 (Ind. Ct. App. 1981).

¹⁶²Kranda claimed numerous errors in addition to those bearing on the statutory

Plaintiff claimed that the trial court erred in allowing two members of the medical review panel to testify regarding their decisions and in admitting each panel member's written opinion because those opinions were based upon casual conversations with other physicians.

Kranda contended that Indiana Code section 16-9.5-9-4¹⁶³ provides that the only information to be considered by the medical review panel under the Act is evidence submitted in writing by the parties. The court acknowledged that section 4 read alone might support that interpretation, but if read in conjunction with section 6 a different interpretation results.¹⁶⁴ Section 6 permits the panel to consult with "medical authorities."¹⁶⁵ Kranda argued that medical authorities include only treatises, journals, medical texts, etc., and that the opinions were not in conformance with the statute.¹⁶⁶ Applying traditional rules of statutory construction, the court of appeals rejected Kranda's argument on the basis that such a construction of the language would unnecessarily narrow the statutory provision.¹⁶⁷ The *Kranda* court noted that the ordinary meaning given to the word "authorities" includes written materials as well as individuals who are qualified in the field.¹⁶⁸ Additionally, the court interpreted section 6 as referring to individuals because the statute states that "[t]he panel may consult *with* medical authorities,"¹⁶⁹ and "ordinarily one consults *with* a person rather than a book or written materials."¹⁷⁰

Kranda also argued that admission of the consultations was impermissible because she had no opportunity to cross-examine the consulted physicians. Because of her lack of knowledge of the conversations, she claims she was unable to present rebuttal evidence. The court also rejected this argument, based on section 5 of the Act which provides that either party may convene the panel and question the members regarding any relevant issues to be decided.¹⁷¹ The court reasoned that Kranda could have availed herself of this opportunity by questioning the members as to any consultations that were made.¹⁷² The court rejected Kranda's final argument regarding the admissibility

construction of the Medical Malpractice Act. The court found all her constitutional attacks to have been settled by *Johnson v. St. Vincent Hospital, Inc.* 404 N.E.2d 585 (Ind. 1980).

¹⁶³IND. CODE § 16-9.5-9-4 (1982).

¹⁶⁴419 N.E.2d at 1032.

¹⁶⁵*Id.* See IND. CODE § 16-9.5-9-6 (1982).

¹⁶⁶419 N.E.2d at 1032.

¹⁶⁷*Id.*

¹⁶⁸*Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 146 (1976)).

¹⁶⁹419 N.E.2d at 1032-33 (quoting IND. CODE § 16-9.5-9-6 (1976) now codified at *id.* § 16-9.5-9-6 (1982)).

¹⁷⁰419 N.E.2d at 1033.

¹⁷¹*Id.*

¹⁷²*Id.*

of the opinions. This argument was based on the fact that the opinions were not in the form of a collegial opinion. The court interpreted section 9 as not prohibitive of individual opinions and pointed out that if such a construction were adopted, individual panel members could not dissent to the majority opinion.¹⁷³

The 1982 Session of the Indiana General Assembly amended the Medical Malpractice Act to include within the definition of patient, "any and all persons having a claim of any kind, whether derivative or otherwise, as a result of alleged malpractice on the part of a health care provider."¹⁷⁴ The Act provides that "[d]erivative claims include, but are not limited to, the claim of a parent or parents, guardian, trustee, child, relative, attorney, or any other representative of such patient including claims for loss of services, loss of consortium, expenses, and all such similar claims."¹⁷⁵

The purpose of the amendment was apparently to clarify an ambiguity in the statute found by the court of appeals in *Sue Yee Lee v. Lafayette Home Hospital, Inc.*¹⁷⁶ In *Sue Yee Lee*, the court found "the Indiana Medical Malpractice Act to be ambiguous and unclear in meaning with regard to whether or not the action of parents for loss of services of, and medical expenses for, a minor child is subject to the act."¹⁷⁷ Looking to historical background in order to find legislative intent, the court in *Sue Yee Lee* concluded that "all actions the underlying basis for which is alleged medical malpractice are subject to the act."¹⁷⁸ Thus the recent amendment has codified the court of appeals' holding in *Sue Yee Lee*.

One effect of the amendment should be to clarify the question whether an action by survivors for a death caused by medical malpractice is properly brought under the Medical Malpractice Act or whether an independent action may be brought under the Wrongful Death Act.¹⁷⁹ The expansive language defining patient as "any and all per-

¹⁷³*Id.* at 1034.

¹⁷⁴IND. CODE § 16-9.5-1-1(c) (1982).

¹⁷⁵*Id.* The amendment suffers from the use of the word "derivative" to refer to such actions as loss of consortium and loss of services. The implication is that any claim brought by one who has not sustained the actual physical injury has a "derivative" claim. However, such claims for loss of consortium or loss of services, though they may have arisen from an alleged medical malpractice, are independent claims for damage to the plaintiff's relational interest with the injured party. See *supra* notes 125-36 and accompanying text.

¹⁷⁶410 N.E.2d 1319 (Ind. Ct. App. 1980). For a discussion of this case, see Harrigan, *Torts, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 425, 429 (1982).

¹⁷⁷410 N.E.2d at 1323.

¹⁷⁸*Id.* at 1324.

¹⁷⁹This problem was raised and discussed in *Warrick Hosp., Inc. v. Wallace*, 435 N.E.2d 263 (Ind. Ct. App. 1982). The court of appeals concluded "that the right to pros-

sons having a claim of any kind" must include claims based on death caused by alleged medical malpractice. Thus, it appears that if death is caused by medical malpractice, any claims that would have been filed on behalf of survivors separately under provisions of the Wrongful Death Act must now be included in the medical malpractice claim and, presumably, will be subject to the limitations on recovery¹⁸⁰ provided for in the Medical Malpractice Act.

G. Tortious Interference With Contract

Although the Indiana Court of Appeals decided several cases during the survey period involving interference with a contractual relationship, *Stanley v. Kelly*¹⁸¹ is the most interesting case from the point of view of legal development—or in this particular case, non-development. In *Stanley v. Kelly*, the court of appeals for the fourth district declined to find that an oral contract of employment terminable at will was an adequate contract to sustain a claim for tortious interference with a contractual relationship.¹⁸²

Plaintiff Stanley and defendant Kelly both worked for Financial Sales Corporation (F.S.C.) in Indianapolis until Stanley fired Kelly. Sometime thereafter, Kelly called the F.S.C. home office and told a top executive that Stanley had fired him because he would not support Stanley's attempt to form his own company. When Stanley was later fired, he brought suit against Kelly alleging both intentional interference with a contractual relationship and slander. The jury entered a verdict for Stanley and awarded him both actual damages and punitive damages. Kelly made a motion to correct errors which the trial court granted on the basis that the verdict was clearly erroneous and not supported by the evidence.¹⁸³ Stanley appealed.

ecute a claim for wrongful death based upon medical malpractice is governed by the wrongful death statute with regard to the parties eligible to institute such proceeding, the persons for whose benefit recovery may be had, and the manner of distribution of such proceeds." *Id.* at 268.

¹⁸⁰IND. CODE § 16-9.5-2-2 (1982).

¹⁸¹422 N.E.2d 663 (Ind. Ct. App. 1981).

¹⁸²*Id.* at 665. For cases which hold that interference with an employment contract terminable at will gives rise to a cause of action, see *American Surety Co. v. Schottenbauer*, 257 F.2d 6 (1958); *Canuel v. Oskoian*, 184 F.Supp. 70 (1960).

¹⁸³422 N.E.2d at 665. This case has had a strange procedural history. The trial court originally granted a new trial pursuant to Trial Rule 59(I)(7). The court of appeals on the first appeal retained jurisdiction but sent the case back to the trial court for clarification on whether the trial court intended to enter judgment for Kelly or grant a new trial. 417 N.E.2d 1145 (Ind. Ct. App. 1981). The trial court clarified its ruling, rendered a judgment for Kelly on the interference with contract issue, and ordered a new trial on the slander issue. In addition to deciding in Kelly's favor on the interference with contract issue, the court on this appeal also found that the trial

Because the court of appeals found that an action for interference with a contractual relationship presupposes the existence of a valid and enforceable contract,¹⁸⁴ and Stanley had only an oral contract of employment which was terminable at will, the court on appeals agreed with the trial court that the verdict in favor of Stanley was clearly erroneous. In so finding, the court of appeals rejected Stanley's argument that a majority of jurisdictions recognize interference with employment contracts terminable at will.

The court purported to find support in Indiana law for its conclusion. The cases cited by the court, however, are either factually distinguishable or mention only in dicta that oral contracts are not a basis for an action in interference with a contract.¹⁸⁵ Thus, Indiana authority does not compel the court's conclusion that an oral contract of employment, which is terminable at will, is insufficient as a basis for a cause of action in tortious interference with contract. In difficult economic times where unemployment is rampant, the employer-employee relationship may be the most important economic relationship one can have. It is unfortunate that the court in *Stanley* was unwilling to fall in line with the majority and to extend protection for oral employment contracts.

H. Malicious Prosecution

*Wong v. Tabor*¹⁸⁶ presented the first opportunity for an Indiana appellate court to review a malicious prosecution suit which was brought by a physician against an attorney for wrongful initiation of a claim for medical malpractice. In *Wong v. Tabor*, attorney Tabor had filed suit against Dr. Wong on behalf of a couple who sustained injuries allegedly caused by Dr. Wong's medical malpractice. When Tabor subsequently failed to answer interrogatories, Wong moved for summary judgment. Prior to the hearing, an attorney from Tabor's office

court did not abuse its discretion in granting Kelly a new trial on the slander issue. 422 N.E.2d at 668-69.

¹⁸⁴422 N.E.2d at 667. The elements of the tort of interference with a contractual relationship were set out by the court of appeals in *Hurst v. Town of Shelburn*, 422 N.E.2d 322 (Ind. Ct. App. 1981). They include:

- (1) existence of a valid and enforceable contract;
- (2) defendant's knowledge of the existence of the contract;
- (3) defendant's intentional inducement of breach of the contract;
- (4) the absence of justification; and
- (5) damages resulting from defendant's wrongful inducement of the breach.

Id. at 325. See also W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 129, at 931-33 (4th ed. 1971).

¹⁸⁵422 N.E.2d at 667 n.3. See *Miller v. Ortman*, 235 Ind. 641, 136 N.E.2d 17, (1956).

¹⁸⁶422 N.E.2d 1279 (Ind. Ct. App. 1981). For further discussion of this case, see Jackson, *Professional Responsibility*, 1982 Survey of Recent Developments in Indiana Law, 16 IND. L. REV. 265, 275 (1983).

informed Wong's attorney that there would be no objection to the entry of summary judgment. The trial court entered summary judgment in favor of Wong, and he subsequently filed suit against Tabor for malicious prosecution. At the trial for malicious prosecution, the medical records indicated that Wong's sole involvement in the original plaintiff's hospital care had been prescribing a laxative. Wong argued that Tabor had been or should have been aware of this fact prior to initiating the suit, and therefore Tabor lacked probable cause for bringing the claim. The jury found in Wong's favor and awarded damages, but the trial court granted Tabor's motion for judgment on the evidence and set aside the verdict for Wong on the ground that the prior dispute was terminated by agreement which served as a bar to Wong's suit.

The four elements to be proven by the plaintiff in a malicious prosecution action are "(a) the defendant instituted, or caused to be instituted, a prosecution against the plaintiff; (b) the defendant acted maliciously in doing so; (c) the prosecution was instituted without probable cause; and (d) the prosecution terminated in the plaintiff's favor."¹⁸⁷ Although the court of appeals for the third district affirmed the trial court's judgment, it held that electing not to oppose summary judgment does not constitute settlement or agreement in terms of terminating the prior malpractice suit.¹⁸⁸ Rather, the appellate court resolved the case on the probable cause element, finding that Wong failed to prove Tabor lacked probable cause.¹⁸⁹

Initially, the court made some general observations on malicious prosecution and its application to the problem of medical malpractice. Noting that malicious prosecution has not been favored by the legal system,¹⁹⁰ the court pointed out that physicians are increasingly alarmed by the recent marked increase in what they often consider groundless malpractice actions, and that physicians have counter-attacked by suing attorneys for malicious prosecution. According to the court, the tort of malicious prosecution was not designed to address the problem of attorneys who file groundless suits, and courts have been reluctant to allow plaintiffs to use it to effect such a result.¹⁹¹ The court recognized, however, that if any cause of action exists against an attorney, malicious prosecution is essentially the only vehicle available for seeking relief.

In addressing the elements of the case, the *Wong* court pointed out that termination in favor of a prior defendant for the purpose of

¹⁸⁷*Id.* at 1283.

¹⁸⁸*Id.* at 1282.

¹⁸⁹*Id.*

¹⁹⁰*Id.* at 1283.

¹⁹¹*Id.*

a malicious prosecution action may occur in a number of ways: adjudication by a competent tribunal, withdrawal of the proceedings by the plaintiff, or dismissal of the proceedings for failure to prosecute.¹⁹² However, if settlement or agreement is the basis for the termination of the suit, no action in malicious prosecution will lie.¹⁹³

Although entry of summary judgment in favor of a prior defendant qualifies as termination in his favor, if the judgment is merely the formal means of securing settlement benefits, then such judgment does not constitute a termination in plaintiff's favor for purposes of a malicious prosecution suit.¹⁹⁴ Thus, the circumstances surrounding the entry of summary judgment must be considered. The court of appeals found no evidence of settlement or agreement in *Wong v. Tabor*. Tabor's decision to forego contesting the motion was apparently a personal choice. Because voluntary abandonment by the plaintiff can constitute termination in favor of the defendant, the court of appeals found that the trial court had erred in setting aside the verdict on this ground. The appellate court found, however, that Wong failed to show probable cause, and on this basis, the court was able to affirm the trial court's decision.¹⁹⁵

The court pointed out that though the probable cause question has previously been addressed from a litigant's perspective, this is the first case to enunciate a standard of probable cause for assessing a lawyer's decision to bring suit. Early in its discussion of the probable cause issue, the court set the stage in such a way that its ultimate conclusion in favor of the attorney defendant comes as no surprise. Purporting to review authorities which have addressed the issue of "articulating a standard by which an attorney's actions may be judged," the court took advantage of the opportunity to point out society's need to keep attorneys free from the threat of suit so they may effectively protect the interests of their clients.¹⁹⁶ An attorney's decision to initiate an action cannot be judged merely from an evaluation of the merits of the case.¹⁹⁷ The lawyer's role is to facilitate access to the judicial system; thus, that role carries a high degree of professional and ethical responsibility of meeting the client's needs even if the client's case is not likely to succeed. Because of this duty to the

¹⁹²*Id.* at 1284 (quoting RESTATEMENT (SECOND) OF TORTS § 674 comment j (1977)).

¹⁹³422 N.E.2d at 1284 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 854 (4th ed. 1971)).

¹⁹⁴422 N.E.2d at 1284.

¹⁹⁵*Id.* at 1290.

¹⁹⁶*Id.* at 1286-87 (quoting RESTATEMENT (SECOND) OF TORTS §§ 674, 676 (1977) and citing Mallen, *An Attorney's Liability for Malicious Prosecution, A Misunderstood Tort*, 46 INS. COUNS. J. 407 (1979); Note, *A Lawyer's Duty to Reject Groundless Litigation*, 26 WAYNE L. REV. 1561, 1587 (1980)).

¹⁹⁷422 N.E.2d at 1285.

client, "mere negligence in asserting a claim is not sufficient to subject an attorney to liability for the bringing of the suit."¹⁹⁸ The court pointed out that if negligence alone were sufficient for liability only "easy cases" would be taken and that would result in a chilling effect upon the legal system.

The *Wong* court looked to the California Court of Appeals' decision in *Tool Research & Engineering Corp. v. Henigson*¹⁹⁹ to define a standard of care for attorneys in initiating a cause of action. The court in *Tool Research & Engineering Corp.* articulated the most frequently cited judicial standard of probable cause:

An attorney has probable cause to represent a client in litigation when, after a reasonable investigation and industrious search of legal authority, he has an honest belief that his client's claim is tenable in the forum in which it is to be tried. The test is twofold. The attorney must entertain a subjective belief in that the claim merits litigation and that belief must satisfy an objective standard.²⁰⁰

The Indiana Court of Appeals noted that this test correctly focuses upon an attorney's right to pursue any claim he deems worthy but, at the same time, offers protection to potential opponents by requiring an objective standard of reasonableness of belief.²⁰¹ The *Wong* court proceeded to establish an objective standard to review the reasonableness of an attorney's action in filing a client's claim stating that the test is "whether the claim merits litigation against the defendant in question on the basis of the facts known to the attorney when suit is commenced."²⁰² An attorney-defendant lacks probable cause only if "no competent and reasonable attorney familiar with the law of the forum would consider that the claim was worthy of litigation on the basis of the facts known by the attorney who instituted suit."²⁰³ The standard recognizes that the facts actually known may be insufficient but seeks to avoid incorporation of what might have been discovered by diligent investigation.²⁰⁴

The court of appeals also intended that the time available for investigation be considered in reviewing the attorney's conduct, and indeed made several references to it in the instant case.²⁰⁵ Tabor had only thirty days to investigate prior to filing suit against numerous

¹⁹⁸*Id.* at 1286.

¹⁹⁹46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975).

²⁰⁰*Id.* at 683, 120 Cal. Rptr. at 297 (citations omitted).

²⁰¹422 N.E.2d at 1288.

²⁰²*Id.*

²⁰³*Id.*

²⁰⁴*Id.* at 1288 n.9.

²⁰⁵*Id.* at 1289.

potential defendants. The court pointed out that many times evidence is not discovered or developed until after suit is filed; therefore, when some factual basis exists for bringing the claim, lack of probable cause is not a basis upon which to rest negligent failure to investigate thoroughly.²⁰⁶

The court took great care in *Wong v. Tabor* to lay out the policy bases for its conclusion. It recognized the trauma and expense suffered by physicians who get caught in the "sue everyone in sight" net so common in the medical malpractice cases and those who must defend groundless lawsuits.²⁰⁷ On the other hand, it ably stated the critical importance of keeping the courtroom door open. Lawyers who fear retribution do not attempt to assert novel claims. Such a stifling effect on the evolution of the law cannot be countenanced. Regardless, this case will do little to dispel the not altogether meritless belief often held by other professionals and the general public that those in the legal profession look after their own.

I. Indiana Tort Claims Act

In *Seymour National Bank v. State*,²⁰⁸ the Indiana Supreme Court granted the state's petition for transfer and vacated the decision of the first district court of appeals because the appellate court had "erroneously decided a new question of law; i.e., the interpretation to be placed upon the term 'enforcement of a law' as used in the Indiana Tort Claims Act."²⁰⁹ In *Seymour*, a state police car involved in a high-speed chase of a fleeing suspected felon collided with a passenger car. The occupants of the car were killed and their personal representative brought suit.

The trial court granted the state's motion for summary judgment on the basis that the state was immune from suit under a provision of the Indiana Tort Claims Act which provides that a governmental entity is not liable for a loss resulting from "the enforcement of, or failure to enforce, a law."²¹⁰ The court of appeals for the fourth district reversed the trial court²¹¹ because it found the phrase "enforcement

²⁰⁶*Id.* (citing *Berlin v. Nathan*, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978)).

²⁰⁷See Note, *Physicians' Cause of Action Against Attorneys For Institution of Unjustified Medical Malpractice Actions: The Aftermath of Drago v. Buonagurio*, 44 ALB. L. REV. 188 (1979).

²⁰⁸422 N.E.2d 1223 (Ind. 1981). For further discussion of this case see Johnson, *Constitutional Law, 1982 Survey of Recent Developments in Indiana Law*, 16 IND. L. REV. 101, 117 (1983).

²⁰⁹*Id.* at 1223 (citing IND. CODE § 34-4-16.5-3(7) (1974), amended by § 34-4-16.5-3(7) (1976) (now codified at *id.* § 34-4-16.5-3(7) (1982))).

²¹⁰IND. CODE § 34-4-16.5-3(7) (1974), amended by IND. CODE § 34-4-16.5-3(7) (1976) (now codified at *id.* § 34-4-16.5-3(7) (1982))).

²¹¹384 N.E.2d 1177 (Ind. Ct. App. 1979).

of, or failure to enforce, a law" ambiguous.²¹² The appellate court concluded that the trial court erred in finding immunity because the statute is in derogation of the common law and a finding of immunity produced a harsh result.²¹³

The supreme court, however, found that the court of appeals had erred in concluding that the term "enforcement of a law" is ambiguous.²¹⁴ Using the time worn, though not necessarily time honored,²¹⁵ axiom of statutory construction that statutory language will be given its "plain meaning," the supreme court held that an officer engaged in attempting to effect an arrest is enforcing a law.²¹⁶ Although the court found that the language of the statute is unambiguous, it stated that even if the language were interpreted as being ambiguous, the legislature's later amendment of the statute clarified its intent by stating that all acts of enforcement except false arrest and imprisonment render the state immune from suit.²¹⁷

Justices DeBruler and Hunter each dissented with separate opinions. Justice DeBruler agreed with the court of appeals that the immunity statute is in derogation of the common law; therefore, the statute should be strictly construed.²¹⁸ Furthermore, he concluded that because the immunity granted by the statute conflicts with a statutory duty that drivers of emergency vehicles operate them with due care, immunity should not be granted which would shield negligent or reckless conduct.²¹⁹

Justice Hunter's dissenting opinion focused on potential abuses of power possible if employees of governmental entities are granted absolute immunity.²²⁰ He suggested that the "King can do no wrong" approach taken by the court's majority leaves citizens with no legal recourse for losses even though a governmental employee may have acted with reckless disregard for the consequences of his "enforcement."²²¹ In addition, Justice Hunter noted a number of inherent ambiguities in the phrase "enforcement of law."²²² He pointed to the fact that the legislature has employed the term "enforcement" to describe a variety of government controlled activities, thus giving

²¹²*Id.* at 1184.

²¹³*Id.* at 1186.

²¹⁴422 N.E.2d at 1226.

²¹⁵See *United States v. American Trucking Ass'n*, 310 U.S. 534 (1940); Jackson, *The Meaning of Statutes*, 34 A.B.A. J. 535 (1948).

²¹⁶422 N.E.2d at 1226.

²¹⁷*Id.*

²¹⁸*Id.* at 1227 (DeBruler, J., dissenting).

²¹⁹*Id.*

²²⁰*Id.* (Hunter, J., dissenting).

²²¹*Id.* at 1228.

²²²*Id.*

rise to a number of different connotations and interpretations of the word.²²³ In addition, he noted that the legislature has not used the word "enforcement" in several contexts in which the activity contemplated could be viewed as "enforcement of law."²²⁴ Such inconsistencies in Justice Hunter's view, open a "Pandora's box of unsettling questions."²²⁵

In a rare written opinion on Petition for rehearing, denominated, in part, Modification of Prior Opinion, the majority attempted to clarify its original opinion.²²⁶ Although the majority upheld its previous position that the state is not liable for losses resulting from its employees' enforcement of or failure to enforce the law, it did address one problem raised by the dissenters to the original opinion. The court considered whether the grant of immunity would protect government entities and employees even where the acts complained of were wilful and wanton or intentional. The majority, on rehearing, found that "[i]t does not follow, however, that the statute necessarily grants immunity for all acts of law enforcement officers committed while engaged in the enforcement of the law."²²⁷ The majority admitted that sometimes "an employee's acts, although committed while engaged in the performance of his duty, might be so outrageous as to be incompatible with the performance of the duty undertaken."²²⁸ Such acts, said the court "are simply beyond the scope of the employment."²²⁹ If the difficulty in granting the immunity in question is that it is prejudicial to the public because losses suffered by private citizens at the hands of government employees go unrecompensed, such a facile answer hardly resolves the problem.

Using traditional agency concepts, the court reasoned that the employee is immune as long as he is the representative of his employer, the immune governmental entity. If the acts of the employee are so outrageous as to be beyond the scope of his employment, then he is no longer covered by the immunity blanket and is subject to suit. This concession gives little solace to the injured plaintiff. As the majority so aptly points out, the governmental entity now has no need

²²³*Id.* See, e.g., IND. CODE § 22-8-1.1-35.6 (1982) (commissioner of the Occupational Health and Safety Board empowered to enforce a safety order, penalty assessment or notice of failure to correct a violation); IND. CODE § 22-2-9-4 (1982) (duty of the commissioner of labor to enforce claims).

²²⁴422 N.E.2d at 1229. See, e.g., IND. CODE § 14-2-3-2 (1982) (director of Fish and Wildlife or his representative may enter private or public property for purpose of managing or protecting any wild animal).

²²⁵422 N.E.2d at 1229.

²²⁶Seymour Nat'l Bank v. State, 428 N.E.2d 203 (Ind. 1981).

²²⁷*Id.* at 204.

²²⁸*Id.*

²²⁹*Id.*

for the immunity because there is no basis for liability.²³⁰ Thus, the employer, as the only likely party to have sufficient funds to pay a judgment, can no longer be held liable. In addition, to find that outrageous behavior puts a governmental employee outside the scope of his employment could have far-reaching negative effects for the plaintiff whose civil rights have been violated by the "enforcement" and who might want to bring a section 1983 action.²³¹

Justice Hunter in his dissenting and concurring opinion reasserted his earlier position that the term "enforcement" is ambiguous.²³² Though he agreed with the majority that the scope of immunity encompassed in the Indiana Torts Claim Act does not include immunity for wilful and wanton misconduct, he concluded that the majority's affirmance of the trial court's grant of summary judgment was inappropriate because the decision of whether the officer's conduct was merely negligent or was wilful and wanton and therefore outside the scope of the immunity should have been for the trier of fact.²³³

The opinions in this case emphasize the conflicting policies surrounding the granting of governmental immunities in situations in which private individuals have suffered losses. State agencies must be free to actively enforce the laws of the state unfettered by the constant threat of suits. On the other hand, the public interest demands that governmental employees and entities act with care so that the rights of citizens will not be jeopardized.

²³⁰*Id.*

²³¹See *Monroe v. Pape*, 365 U.S. 167 (1961).

²³²428 N.E.2d at 206 (Hunter, J., dissenting).

²³³*Id.*

XVIII. Trusts and Decedents' Estates

DEBRA A. FALENDER*

Several interesting and significant developments in the areas of trusts, estates, and guardianships occurred during the survey period. The most important cases and statutes will be discussed within the following sections of this Survey: decedents' estates, trusts, powers of appointment, and guardianships.

A. Decedents' Estates

1. *Will Contests.*—In *Carrell v. Ellingwood*,¹ the court of appeals held that will contestants were entitled to rely on the personal representatives' misrepresentation of the date on which the will was offered for probate. In this case, the will had in fact been offered for probate on August 8, 1979. A complaint contesting the will was filed on January 11, 1980, which was three days beyond the five-month time period for filing a will contest.² Summary judgment was rendered for the proponents of the will, but was reversed on appeal because of the existence of genuine issues of material fact as to whether the attorney for the personal representatives was guilty of a fraudulent misrepresentation. The contestants alleged that the representation by the personal representatives' attorney to the contestants' attorney that the will had been offered for probate sometime in November was the effective cause of the contestants' failure to timely file the contest action.³

The crucial substantive issue⁴ addressed by the *Carrell* court was "whether under any circumstances a plaintiff will be permitted to file his complaint to contest a Will beyond the five-month period fixed by [statute]."⁵ In addressing this issue, the court cited several cases to support the statement that "it is well established in Indiana that the running of the five month period will not foreclose a plaintiff in a will contest from filing his action where he has been induced to refrain from a timely filing by a fraudulent misrepresentation of the

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¹423 N.E.2d 630 (Ind. Ct. App. 1981).

²See IND. CODE § 29-1-7-17 (1982).

³423 N.E.2d at 636.

⁴Other issues resolved by the *Carrell* court were whether the trial court treated the proponents' motion as a motion to dismiss or as a motion for summary judgment and, further, whether the trial court erred in not giving the parties a reasonable time to present material pertinent to the summary judgment motion. The court of appeals held that the trial court had treated the motion as a motion for summary judgment and that the trial court's failure to afford a reasonable time for presentation of additional material was reversible error.

⁵423 N.E.2d at 634.

defendant."⁶ The cases cited, however, do not so clearly establish the proposition that fraudulent conduct will permit the extension of the statutory contest filing period. For example, one of the cases cited and quoted by the court, *Guy v. Schuldt*,⁷ involved the question whether fraud will extend the period of a statute of limitations. Yet, the case is inapposite to *Carrell* because the five-month contest period is categorized consistently, not as a statute of limitations, but as a jurisdictional condition precedent to the contest action.⁸

The other cases cited in support of the "well established" proposition have one major flaw when they are subjected to careful analysis. All of the cited cases rely upon the case of *Fort v. White*,⁹ which has been cited frequently as precedent for the proposition that the five-month contest period may be extended if there is fraud. Yet, the *Fort* court did not hold that the statutory time period would be extended as a result of the fraudulent conduct of the will proponents, but held that the burden of proof would not shift from the proponents to the contestants, under a statute that then placed the burden of proof on the first party to the courthouse, given that the proponents had fraudulently discouraged the contestants from attempting to win that race to the courthouse.¹⁰

Although the doctrine that fraud may relieve parties from non-compliance with the statutory contest filing period is not as well established as the *Carrell* court would have it believed, the question that must be addressed is whether such a doctrine should become well established. Certainly, if the statutory time period for will contests is extended for any reason, there is the possibility of delay in the settlement of decedents' estates, and this possibility of delay contradicts the strong policy of the Probate Code, which is in favor of the speedy settlement of estates.¹¹ A three-day contest filing extension,

⁶*Id.* at 635 (citing, among others, *Modlin v. Riggle*, 399 N.E.2d 767 (Ind. Ct. App. 1980); *Squarey v. Van Horne*, 163 Ind. App. 64, 321 N.E.2d 858 (1975); *Brown v. Gardner*, 159 Ind. App. 586, 308 N.E.2d 424 (1974); *Estate of Plummer v. Kaag*, 141 Ind. App. 142, 219 N.E.2d 917 (1966); *Fort v. White*, 54 Ind. App. 210, 101 N.E.2d 27 (1913)).

⁷236 Ind. 101, 138 N.E.2d 891 (1956) (dealing with the medical malpractice statute of limitations).

⁸*See, e.g., Modlin v. Riggle*, 399 N.E.2d 767, 769 (Ind. Ct. App. 1980); *Squarey v. Van Horne*, 163 Ind. App. 64, 68, 321 N.E.2d 858, 860 (1975).

⁹54 Ind. App. 210, 101 N.E. 27 (1913).

¹⁰*Id.* at 217, 101 N.E.2d at 30. When the *Fort* controversy arose, the statutory contest period was three years. The contestant filed the contest action within this three-year time period. *Id.* at 215, 101 N.E.2d at 29.

¹¹*See, e.g., In re Estate of Kingseed*, 413 N.E.2d 917, 923 (Ind. Ct. App. 1980) ("[I]t is now a well established policy of the law, and one which this Court is committed to strictly oversee that estates shall be settled as speedily as possible.") (citing *In re McGregor's Estate*, 210 Ind. 546, 2 N.E.2d 395 (1936); *In re Estate of Hogg*, 150 Ind. App. 650, 276 N.E.2d 898 (1971); *Kuzman v. Peoples Trust & Savings Bank*, 132 Ind. App. 176, 176 N.E.2d 134 (1961)).

such as in the *Carrell* case, would not disrupt the orderly, efficient, and speedy settlement of an estate, but a three-month or three-year contest filing extension could cause great uncertainty and confusion. For example, if an estate has been distributed to the will's beneficiaries before the fraud is discovered, it may be inequitable to allow a late will contest, particularly if all the distributed assets could not be traced. Even if the distributed assets could be traced, it may be inequitable to demand the return of these assets pending the resolution of the contest action. Although fairness to the contestants in the *Carrell* case seemed to demand the potential extension of the contest filing period for three days, perhaps *Carrell* is one of those proverbial hard cases that make bad law, because nothing would preclude the possibility of extension of the filing period for a much longer period of time.

The *Carrell* court held that for fraudulent misrepresentation to permit late filing of a contest action, the fraudulent misrepresentation must be of a kind that would entitle a plaintiff to relief; namely, it must be a material misrepresentation of past or existing fact, that is false, that is made with scienter, and that causes detrimental reliance on the part of those who now must seek an extension of the filing period.¹² The court's discussion of the reliance element is most interesting in light of the facts of the case. In *Carrell*, the contestants' attorney did not actually know when the will had been offered for probate, but he "understood from his clients that it was sometime during the month of September."¹³ In fact, the will had been offered on August 8, 1979, four days after the decedent's death. The contestants' attorney did not check the probate court records, which would have disclosed the date of offer. Throughout the fall of 1979, the contestants' attorney and the personal representatives' attorney negotiated for a settlement of their differences. On January 4, 1980, when the contestants' attorney told the personal representatives' attorney that he needed a response to a settlement proposal because time for filing a contest was "running short," the personal representatives' attorney replied that the contestants "had plenty of time to file [their] action because the will was probated in November."¹⁴ In spite of the inconsistent information received from his clients and his

¹²423 N.E.2d at 635.

¹³*Id.* at 632.

¹⁴*Id.* The court does not quote the representation of the personal representatives' attorney, but the court's paraphrase indicates that the personal representatives' attorney represented as a fact only the date of probate of the will. The date of probate, however, is irrelevant in determining when the statutory contest filing period begins to run. The contest time period begins when the will is offered for probate. IND. CODE § 29-1-7-17 (1982). Ordinarily, however, unless objections to probate are filed prior to the offer for probate, the offer and admission are on the same day. See *id.* § 29-1-7-13. In *Carrell*, the will was offered and admitted to probate on the same day.

opponents, the contestants' attorney still did not check the probate court records. Instead, he waited until January 11, 1980, when the personal representatives' attorney had promised to "get back to him." On January 11, the contestants' attorney first became actually aware of the true date of the offer and admission of the will to probate, when the personal representatives' attorney called to say that his clients would not settle and that the contest period had expired.¹⁵

The *Carrell* court cited several cases in support of the proposition that a fraudulent misrepresentation may be relied upon by someone without actual knowledge of the true facts, even though the true facts are a matter of public record.¹⁶ In none of these cases, however, was the person relying on the misrepresentation an attorney, as in the *Carrell* case, and in none of these cases was the misrepresented fact one that the person relying should have known was certainly a matter of public record. The *Carrell* court could have decided that an attorney engaged in representing the contestants of a will, as a matter of law, did not exercise "ordinary care and diligence to guard against fraud"¹⁷ when he failed to check the public records to discover the precise date that the statute that might eventually bar his clients' contest action began to run. Instead, the court decided that the question of the reasonableness of the conduct of the contestants' attorney was a question of fact, which precluded the entry of summary judgment.

2. *Claims Against the Estate.*—Two years ago, in the case of *In re Estate of Williams*,¹⁸ the court of appeals held that an action to enforce a corporate stock buy-sell agreement against the estate of a deceased shareholder was not a claim barred by the failure to file against the shareholder's estate within the five-month claim filing period set forth in Indiana Code section 29-1-14-1.¹⁹ The court further

¹⁵423 N.E.2d at 632.

¹⁶*Id.* at 635 (citing *Backer v. Pyne*, 130 Ind. 288, 30 N.E. 21 (1892); *Fisher v. Tuller*, 122 Ind. 31, 23 N.E. 523 (1890); *Ledbetter v. Davis*, 121 Ind. 119, 22 N.E. 744 (1889); *Dodge v. Pope*, 93 Ind. 480 (1884); *Campbell v. Frankem*, 65 Ind. 591 (1879); *Shuee v. Gedert*, 395 N.E.2d 804 (Ind. Ct. App. 1979)).

¹⁷423 N.E.2d at 635.

¹⁸398 N.E.2d 1368 (Ind. Ct. App. 1980), noted in *Falender, Decedents' Estates and Trusts, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 291, 298-301 (1981).

¹⁹398 N.E.2d at 1370. The assertion of enforceability of the buy-sell agreement, under which the estate of the first to die of the two shareholders was obligated to sell his stock to the survivor, was not a claim barred by failure to file within the time constraints of IND. CODE § 29-1-14-1 (1982). A claim is "'a debt or demand of a pecuniary nature which could have been enforced against the decedent in his lifetime and could have been reduced to a simple money judgment.'" (*In re Estate of Williams*, 398 N.E.2d 1368, 1370 (Ind. Ct. App. 1980) (quoting *Vonderahe v. Ortman*, 128 Ind. App. 381, 387, 146 N.E.2d 822, 825 (1958)).

held, however, that failure to assert the enforceability of the buy-sell agreement within the five-month period of Indiana Code section 29-1-14-21 barred the adjudication of enforceability as a part of the estate proceeding.²⁰ The case left several questions unresolved, including whether it is possible to assert the enforceability of the agreement outside the estate proceeding.²¹

During the 1982 survey period, in the case of *Williams v. Williams*,²² the court of appeals held that the same buy-sell agreement that was at issue in the first *Williams* case was enforceable in a court other than the probate court against the heirs or devisees who succeeded to the decedent's interest in the stock.²³

Both *Williams* cases, however, leave several questions unresolved. One question is whether the personal representative is a necessary party to the enforcement proceeding. Another question is whether the personal representative, if made a party, can be considered the representative of heirs and devisees who are not, or cannot be, made parties. The second *Williams* court stated that “[e]nforcement of the agreement may be pursued in other courts against the heirs or devisees who succeed to [the decedent's] interest in the stock.”²⁴ The court, however, made no mention of the personal representative as a party to the action despite the fact that in *Williams*, the personal representative, who was also the successor to the decedent's interest in the stock, was a party, both as an individual and as a personal representative. Because the issue of necessary and proper parties was not expressly raised, the court's statement, which recognizes an action against heirs or devisees, but fails to mention the personal representative, is not controlling on the issue whether the personal

²⁰398 N.E.2d at 1371. IND. CODE § 29-1-14-21 (1982) provides:

When any person claims any interest in any property in the possession of the personal representative adverse to the estate he may file, prior to the expiration of five (5) months after the date of the first published notice to creditors, a petition with the court having jurisdiction of the estate setting out the facts concerning such interest and thereupon the court shall cause such notice to be given to such parties as it deems proper, and the case shall be set for trial and tried as in ordinary civil actions.

²¹See Falender, *supra* note 18, at 300.

²²427 N.E.2d 727 (Ind. Ct. App. 1981), *reh'g granted in part*, 432 N.E.2d 417 (Ind. Ct. App. 1982). For a discussion concerning the effects on shareholders, see Galanti, *Business Associations*, 1982 *Recent Developments in Indiana Law*, 16 IND. L. REV. 25, 40 (1983).

²³427 N.E.2d at 731. The permissive language of IND. CODE § 29-1-14-21 (1982) (“may file”), and the failure of that section to provide that an interest not asserted within five months is “forever barred,” can only mean that an interest in property of the type described in that section may be asserted outside the estate proceeding even if not asserted within five months in the estate proceeding.

²⁴427 N.E.2d at 731.

representative should be joined in the enforcement action. Prudence, however, would dictate the joinder of the personal representative whenever the estate is still open.

In any event, the two *Williams* cases are a reminder that there is some hope for a claimant who discovers that he has missed the five-month claim filing period of Indiana Code section 29-1-14-1. If the claim can be couched as an interest in property in the possession of the personal representative, then the property interest claim can be asserted against the decedent's successors in interest outside the probate proceeding and after the five-month claim filing period.

In *Fort Wayne National Bank v. Scher*,²⁵ the court of appeals stated that the trial court did not abuse its discretion when it allowed the payment of funeral expenses equal to more than one-half the value of the decedent's estate, because the value of the decedent's estate is only one of several factors to be considered in determining whether the amount claimed is reasonable.²⁶ In regard to funeral expenses, it is interesting to note that the only Probate Code provisions that refer to reasonableness are the provisions of Indiana Code section 29-1-14-9, which deal with priorities. Only reasonable funeral expenses are entitled to priority over all claims, except costs of administration.²⁷ Nothing specific in the Code precludes the allowance of even unreasonable funeral expenses, yet the *Scher* court assumed without discussion that only reasonable funeral expenses may be allowed.²⁸

Two other claim cases are worthy of brief mention. In *First National Bank & Trust Co. v. Coling*,²⁹ the court of appeals affirmed the trial court's grant of the claimant's Trial Rule 60(B) motion for relief from judgment. The appellate court determined that in light of documented errors on the part of the court clerk and documented diligence of counsel, the trial court did not abuse its discretion in granting the motion.³⁰ In *Hicks v. Fielman*,³¹ the court held that an ex-wife is a creditor of her deceased ex-husband's estate to the extent that an award to her constitutes a property settlement payable in installments, but not to the extent that an award to her constitutes maintenance, because maintenance ceases at death.

3. *Dead Man's Statutes*.—In *Satterthwaite v. Estate of Satterthwaite*,³² a son filed a claim against his deceased father's estate

²⁵419 N.E.2d 1308 (Ind. Ct. App. 1981).

²⁶*Id.* at 1312. Other factors are "the necessity for the amount expended or incurred, the reasonableness of the price charged for the articles or services, and the decedent's rank or condition in life" *Id.*

²⁷IND. CODE § 29-1-14-9(2) (1982).

²⁸See 419 N.E.2d at 1312.

²⁹419 N.E.2d 1326 (Ind. Ct. App. 1981).

³⁰*Id.* at 1331.

³¹421 N.E.2d 716 (Ind. Ct. App. 1981).

³²420 N.E.2d 287 (Ind. Ct. App. 1981).

to enforce the father's alleged promise to devise a farm to him. Before the trial on the claim, the father's surviving spouse, the son's mother, quitclaimed her interest in the farm to the son. Although one section of the dead man's statute provides that a party's grantor is incompetent as a witness in a lawsuit that may result in judgment for or against the estate, the court decided that this statute was not intended to apply to render the son's mother an incompetent witness.³³ The purpose of the statutory provision rendering a party's grantor incompetent is to prevent an incompetent witness from transferring his claim against, or interest in, the decedent's estate to another, thereby avoiding the bar placed on this testimony by other sections of the dead man's statute. In *Satterthwaite*, the mother was not an incompetent witness prior to the transfer to the son and the transfer did not render her incompetent within the intent of the statute.³⁴

4. *Personal Representatives.*—The 1982 legislature amended the statute that specifies the qualifications for being a personal representative in Indiana.³⁵ Nonresidence is no longer a disqualifying factor.³⁶ Effective June 1, 1982, a nonresident may serve as a joint personal representative with a resident by filing a bond in an amount not less than the probable value of the decedent's personal property plus the estimated rents and profits that may be derived from the property during the period of administration of the estate, and not greater than the probable value of the decedent's gross estate.³⁷ A nonresident may also serve as a sole personal representative or as a joint personal representative with another nonresident by filing the above-described bond and by filing notice of his acceptance of the appointment as personal representative and notice of the appointment of a resident agent to accept service of process.³⁸ If a personal representative becomes a nonresident, he will not be disqualified if he files the above-described bond.³⁹

5. *Unsupervised Administration.*—Effective for estates of decedents who die after May 31, 1982, a petition for unsupervised administration may be granted without the joinder or consent of heirs

³³IND. CODE § 34-1-14-10 (1982). See *id.* §§ 34-1-14-6, -7 (rendering parties incompetent witnesses).

³⁴420 N.E.2d at 290.

³⁵Act of Feb. 18, 1982, Pub. L. No. 173, § 1, 1982 Ind. Acts 1326 (currently codified at IND. CODE § 29-1-10-1 (1982)).

³⁶*Id.* (currently codified at IND. CODE § 29-1-10-1(b) (1982)).

³⁷*Id.* (currently codified at IND. CODE § 29-1-10-1(c) (1982)).

³⁸*Id.* (currently codified at IND. CODE § 29-1-10-1(d) (1982)). One who qualifies under this section submits personally to the jurisdiction of the Indiana courts. IND. CODE § 29-1-10-1(f) (1982).

³⁹*Id.* (currently codified at IND. CODE § 29-1-10-1(e) (1982)). One who qualifies under this section submits personally to the jurisdiction of the Indiana courts. IND. CODE § 29-1-10-1(f) (1982).

or devisees if the decedent authorized unsupervised administration in his will.⁴⁰ Why the statute is not effective for all estates is a good question.

B. Trusts

1. *Trusts and Adopted Children.*—In *In re Walz*,⁴¹ the settlor had established an inter vivos trust containing the following clause:

“The balance of the income may be accumulated by the trustee or in its discretion may be distributed among the descendants of the Grantor, per stirpes. Upon the death of Lorraine I Walz, the remainder of the trust property shall be divided and distributed among the children of the Grantor, namely Donald Walz and Jacqueline Keown, equally, share and share alike or to the Grantor’s descendants per stirpes, as their absolute property forever.”⁴²

After execution of the trust, the settlor adopted Michael, the son of his wife, Lorraine. Following the settlor’s death, the trustee sought instructions as to whether Michael was an intended discretionary income beneficiary of the trust. The court of appeals concluded that, because “[t]he entire trust establishes a design of specific property benefiting specific individuals,”⁴³ Michael was not an intended income beneficiary of the trust.

In *Walz*, the specific phrase in the trust agreement that disposed of income read: “‘among the descendants of the Grantor, per stirpes.’”⁴⁴ This language could be interpreted either to include Michael or not to include him. To discern the settlor’s intent in regard to Michael, the court examined not only the language of this ambiguous phrase, but also the language of the entire trust. The court concluded that the subsequent naming of Donald and Jacqueline individually, albeit in a disposition of principal and not income, created a presumption that the settlor intended to benefit Donald and Jacqueline specifically rather than the class of children, or descendants, of the settlor, into which class Michael might or might not fall.⁴⁵ The presumed intent was confirmed, in the court’s view, by the fact that at

⁴⁰Act of Feb. 24, 1982, Pub. L. No. 172, 1982 Ind. Acts 1325 (currently codified at IND. CODE § 29-1-7.5-2(a) (1982)). Of course, all the other requirements for unsupervised administration must be met; namely, the estate must be solvent, and the personal representative must be qualified to administer the estate without court supervision. *Id.*

⁴¹423 N.E.2d 729 (Ind. Ct. App. 1981).

⁴²*Id.* at 730-31 (quoting trust provision).

⁴³*Id.* at 737. The intent of the settlor is the “polestar for construing trust provisions.” *Id.* at 733.

⁴⁴*Id.* at 734.

⁴⁵*Id.* at 736.

the time of the trust's execution the settlor had two children, Donald and Jacqueline; he had been married to Lorraine for six years; and Michael had lived with Lorraine and the settlor during the entire six-year period.⁴⁶

Because of the court's conclusion regarding the settlor's intent to benefit specific individuals, the court did not reach the question whether an adopted child is presumptively included within a class described as "children" or "descendants." In dicta, however, the court made the following significant comment:

[W]e find the Probate Code to strongly represent the public policy of this state that an adopted child is to be treated as though the natural child of the adopting parent. We certainly give that strong public policy due consideration when construing trust terms. Or, for example, we may well refer to the rules for interpretation of wills, I.C. 29-1-6-1, under the Probate Code to aid our interpretation of trust provisions.

. . . .

. . . However, we do conclude that the Probate Code does not control the interpretation and construction of the terms of inter vivos trusts.⁴⁷

If this dicta is followed, courts construing inter vivos trust provisions may refer to the rules of construction of the Probate Code. The specific rules of the construction that may be of benefit in construing trust terms are the rules regarding gifts to "heirs" or "next of kin,"⁴⁸ and the rules regarding adopted children⁴⁹ and illegitimate

⁴⁶The intent of the settlor is to be discerned from an examination of the trust language "in the light of the facts and circumstances surrounding the settlor at the time the trust was executed." *Id.* at 734.

⁴⁷*Id.* at 733 (emphasis added by court).

⁴⁸IND. CODE § 29-1-6-1(c) (1982) provides:

A devise of real or personal estate, whether directly or in trust, to the testator's or another designated person's "heirs" or "next of kin" or "relatives," or "family," or to "the persons thereunto entitled under the intestate laws" or to persons described by words of similar import, shall mean those persons, including the spouse, who would take under the intestate laws if the testator or other designated person were to die intestate at the time when such class is to be ascertained, domiciled in this state, and owning the estate so devised. With respect to a devise which does not take effect at the testator's death, the time when such class is to be ascertained shall be the time when the devise is to take effect in enjoyment.

⁴⁹*Id.* § 29-1-6-1(d) provides:

In construing a will making a devise to a person or persons described by relationship to the testator or to another, any person adopted prior to his twenty-first (21st) birthday before the death of the testator shall be considered the child of his adopting parent or parents and not the child of

children.⁵⁰ Of these rules of construction, it would seem that only the rules regarding adopted children and illegitimate children could be said to be representative of a strong public policy of the state of Indiana. Therefore, perhaps only those rules of construction will be looked to in construing trust terms. Certainly, the enactment of a specific trust code provision similar to the Probate Code provision would be preferable to borrowing rules from wills statutes that were never intended to apply to trusts. Because Indiana does not have such a trust code provision, however, the Probate Code is clearly a logical source for guidance in the construction of trust documents, which often are used as will substitutes.

2. *Revocation of Trusts.*—In *Breeze v. Breeze*,⁵¹ the settlor established a revocable inter vivos trust, on the eve of his marriage, naming himself as trustee and as life income beneficiary, and naming his nieces and nephews as remainder beneficiaries. The settlor did not specify a method for revoking the trust. After the settlor died, the trial court, in a lawsuit instituted by the settlor's surviving spouse, concluded that the trust had been revoked by the settlor's failure to fulfill his duties as trustee.⁵² Therefore, the assets of the trust were assets of the settlor's estate. The court of appeals, however, reversed the trial court. According to the appellate court, failure of the settlor-trustee to fulfill his duties as trustee did not revoke the trust; there must be a manifestation of intent to revoke, and such a manifestation was lacking in the *Breeze* case.⁵³

3. *Statutory Amendments.*—A new chapter that was added in 1982, Indiana Code sections 30-2-10-1 through -10, specifies new and more detailed requirements for the establishment of funeral trusts, and is effective for trusts created after July 1, 1982.⁵⁴ Further, after

his natural or previous adopting parents: Provided, that if a natural parent or previous adopting parent shall have married the adopting parent before the testator's death, the adopted person shall also be considered the child of such natural or previous adopting parent. Any person adopted after his twenty-first (21st) birthday by the testator shall be considered the child of the testator, but no other person shall be entitled to establish relationship to the testator through such child.

⁵⁰*Id.* § 29-1-6-1(e) provides:

In construing a will making a devise to a person described by relationship to the testator or to another, an illegitimate person shall be considered the child of his mother, and also of his father, if, but only if, his right to inherit from his father is, or has been, established in the manner provided in IC 1971, 29-1-2-7.

⁵¹428 N.E.2d 286 (Ind. Ct. App. 1981).

⁵²*Id.* at 287.

⁵³*Id.* at 288. One court has held that a trust may be revoked upon the execution of a will with a revoking provision in it. *In re Estate of Lowry*, 93 Ill. App. 3d 1077, 418 N.E.2d 10 (1981).

⁵⁴This new chapter has replaced IND. CODE §§ 30-2-9-1 to -8 (1976 & Supp. 1981),

recent amendments, Indiana Code section 30-4-3-31 now provides that charitable trusts, and even transfers not in trust, may be amended to qualify for federal income tax advantages under appropriate circumstances.⁵⁵

C. Powers of Appointment

1. *Choice of Law.*—In 1931, the decedent's mother, a resident of New York, created a testamentary trust for the benefit of the decedent for life and with the power in the decedent to appoint the corpus of the trust by will. The decedent died in 1973, a resident of Indiana. The decedent's will contained a general residuary clause but did not mention the power of appointment. Under Indiana law, a will does not operate as an exercise of a power of appointment unless the "will specifically indicates that the testator intended to exercise said power."⁵⁶ Under New York law, however, a general residuary clause in a will is rebuttably presumed to be an exercise of a general power of appointment.⁵⁷ The question raised in *White v. United States*⁵⁸ was whether the power of appointment had been exercised in the general residuary clause in the will of the decedent, the donee of the power.

The federal district court in *White* concluded that there was evidence, particularly that of "the tax effect and the resulting dissipation" of the donee's estate, to rebut the presumption of exercise under New York law.⁵⁹ The *White* court concluded, in the alternative, that New York law would not apply to determine whether the donee, an Indiana domiciliary, intended to exercise the power.⁶⁰

which was amended in 1982 to apply to funeral trusts created after June 30, 1978, and before July 1, 1982.

⁵⁵IND. CODE § 30-4-3-31 (1982).

⁵⁶IND. CODE § 29-1-6-1(f) (1982).

⁵⁷N.Y. EST. POWERS & TRUSTS LAW § 10-6.1(a)(4) (McKinney 1967). A general power of appointment is a power exercisable in favor of the donee or his estate. New York law also raises a rebuttable presumption that a general residuary clause is an exercise of a special power of appointment. *Id.* A special power of appointment is a power that is not exercisable in favor of the donee or his estate.

⁵⁸511 F. Supp. 570 (S.D. Ind. 1981) *aff'd*, 680 F.2d 1156 (7th Cir. 1982). In *White*, the Internal Revenue Service argued that the power had been exercised and thus, the value of the appointed property was included in the decedent's taxable estate. The executor of the decedent's estate argued that the power had not been exercised. Under the facts of the case, the takers of the property appear to be the same regardless if the power was deemed exercised by the residuary clause, because the takers in default of appointment were the decedent's "issue," and the residuary devisees were the decedent's three surviving children who were the decedent's only surviving issue.

⁵⁹*Id.* at 576. The difference was not which people took the money, but that the same people would have taken \$112,216.52 less as a result of tax liability, if the power was deemed exercised. See *supra* note 58.

⁶⁰511 F. Supp. at 576-79.

In deciding that New York law would not apply, the court acknowledged that it should look to the Indiana choice of law rule to determine the applicable law, but the court noted that Indiana has no choice of law rule regarding the exercise of powers of appointment.⁶¹ Although the general choice of law rule would look to the law of the donor's domicile (New York),⁶² not the law of the donee's domicile (Indiana), to determine whether the donee intended to exercise the power, the *White* court decided that Indiana would not follow this much criticized general rule. Instead, the federal court determined that Indiana would apply the "better reasoned and more practical choice of law rule" that looks to the law of the donee's domicile for resolving matters of construction of the donee's will.⁶³

Certainly, the choice of law rule that looks to the law of the donee's domicile to decide if the donee of a power of appointment properly manifested the intent to exercise that power is more likely to promote the reasonable expectations of the donee than the rule that prefers to look to the law of the donor's domicile when attempting to discern the donee's intent. This is obvious after considering the typical facts of a case like *White*, where the donee and the donor were not domiciled in the same state. A testator domiciled in Indiana, as was the donee in the *White* case, would not likely consider that his will would be construed by applying the law of New York.⁶⁴ An Indiana domiciliary would likely draft his will in light of Indiana law.

The traditional choice of law rule, which applies the law of the donor's domicile to determine if the donee intended to exercise the power of appointment, does have some logic to support it. A power of appointment is said to emanate from the donor; the donee is merely a conduit for the transfer of property from the donor to the ultimate takers. Therefore, when the donee appoints the property, the appointment is ordinarily treated as if it were written into the donor's will.⁶⁵

⁶¹*Id.* at 576. The court cited *Sexton v. United States*, 300 F.2d 490 (7th Cir.), *cert. denied*, 371 U.S. 820 (1962), in support of the rule that the federal court sitting in Indiana must apply Indiana choice of law rules. The parties were in agreement as to the nonexistence of an Indiana choice of law rule.

⁶²See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 275 (1969).

⁶³511 F. Supp. at 578.

⁶⁴Unless, of course, the testator owned real property in New York, in which case the general choice of law rule would conclude that the testator's disposition of the real property should be governed by and construed by the law to be chosen by the situs of the real property. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 240 (1969).

⁶⁵The conduit description is acknowledged in two recent cases reviewed in this Survey, *Indiana Dep't of State Revenue v. Estate of Martindale*, 423 N.E.2d 662 (Ind. Ct. App. 1981), and *Indiana Dep't of State Revenue v. Estate of Hungate*, 426 N.E.2d 433 (Ind. Ct. App. 1981). See *infra* notes 77-88 and accompanying text. Furthermore, for example, in considering whether a power or an appointment under it violates the rule against perpetuities, the exercise is read into the will of the donor of the power.

Thus, the traditional choice of law rule is but a simple extension of this conventional fiction; if the power is treated as if written into the donor's will, then it is the donor's will that is being construed to determine whether the power was exercised. This simple extension of conventional fiction, however, is truly a perversion when applied to the facts of nearly any given case. Whatever rhetoric is used to describe the creation and exercise of a power of appointment, the plain fact remains that the donor gave the donee the power to appoint and whether the donee appoints is purely a matter of the donee's intent, which must be properly manifested under the law that applies to determine the donee's intent. If that intent appears in a will, then the law of the donee's domicile should apply when interpreting that will for any purpose, including determining whether a power of appointment has been exercised.⁶⁶

The entire choice of law problem would be avoided by careful and thorough drafting. When creating the power, the donor should provide that the law of the donee's domicile is applicable in determining whether the power had been exercised.⁶⁷ The donee should be clear in stating his or her intention to exercise the power or not to exercise it, thus not leaving the interpretation of a general residuary clause in the hands of the courts.⁶⁸

2. *Power or Vested Interest.*—In a straightforward trust interpretation case, *Lincoln National Bank & Trust Co. v. Figel*,⁶⁹ the court of appeals followed the strong preference of Indiana law for the early vesting of estates⁷⁰ and, reversing the trial court, held that the following clause in a testamentary trust was not merely a power of appointment, but gave the testator's daughter, Gloria, a vested interest in the trust upon her attaining the age of 35:⁷¹

⁶⁶This was the general principle followed in the *White* case, where the court stated:

It is more logical to conclude that the law of the domicile of the testator at his death should apply to interpreting a will for all purposes, including whether or not a power is exercised. This is the view followed in the Uniform Probate Code and most recently followed by federal courts in power of appointment cases and other similar litigation.

511 F. Supp. at 574. Of course, the law chosen by the situs of the real property governs the construction of a will that disposes of that real property. See *supra* note 64.

⁶⁷The donor could provide that the law of his or her own domicile should be applied in determining the donee's exercise or not, but that would be illogical and impractical for the same reasons that the choice of law rule that chooses the donor's domicile is illogical and impractical. The donor could, of course, be precocious and choose the law of Timbuktu as the controlling law.

⁶⁸No good draftsman will rely on rules of construction to carry the day in promoting his or her client's intent. The intent should be stated clearly and precisely, whether the intent is that the power be exercised or not.

⁶⁹427 N.E.2d 5 (Ind. Ct. App. 1981).

⁷⁰See, e.g., *Burrell v. Jean*, 196 Ind. 187, 146 N.E. 754 (1925); *Aldred v. Sylvester*, 184 Ind. 542, 111 N.E. 914 (1916).

⁷¹427 N.E.2d at 9.

"When my wife shall no longer be living and my daughter shall have attained the age of thirty-five (35) years, or at any time thereafter upon her request, the Trustee shall distribute and pay over the entire trust estate . . . to my daughter but if my daughter shall die before attaining age thirty-five (35), then at the death of the survivor of my wife and daughter the Trustee shall distribute the entire trust estate to or hold the same for such spouse, issue, spouses of issue, and widows or widowers of deceased issue of my daughter as my daughter shall by will appoint."⁷²

The dispute in *Figel* arose after Gloria's death. Her executor and her children disagreed as to the proper distribution of the trust assets. Gloria had survived the testator's wife and had lived past the age of thirty-five.⁷³ Gloria's children did not convince the court, however, that Gloria had only a power of appointment, which, upon her failure to exercise it, passed to them as the takers in default.⁷⁴ For several reasons, each based on the language used by the testator, the court agreed with the executor that Gloria had a vested interest in the trust property, which passed to her own residuary trust upon her death.⁷⁵ The most convincing reasons were that the testator clearly knew how to establish a power of appointment, as evidenced by his creation of a testamentary power of appointment in favor of Gloria if she died before attaining the age of thirty-five, so that if he had also intended the creation of an inter vivos power he would have said so more specifically and, that the trustee was instructed to pay over and to distribute the entire trust estate, and nothing less, which implies a vesting of interest, rather than a power of appointment.⁷⁶

3. Inheritance Tax and Powers.—The relevant facts of two recent

⁷²*Id.* at 6. The clause, in part, further provided:

To the extent that the entire trust estate is not effectively appointed by such power of appointment the same shall be distributed per stirpes among the then living issue of my daughter but if any issue shall not have attained the age of twenty-one (21) years, then the share of the trust estate which would have been distributed to such minor issue shall be held in trust by the Trustee for the benefit of such issue until such issue attains the age of twenty-one (21) years.

Id. at 6-7 (quoting the trust agreement).

⁷³The executor argued that the assets of the trust should be included in Gloria's estate and distributed to her residuary trust, because she had attained the age of 35 at her mother's death and the trust estate had vested in her at that time. Gloria's children argued that Gloria had only a power to appoint the trust estate and that, upon her failure to exercise the power, the trust estate should be distributed to them at age 21 as takers in default under Gloria's father's will. *Id.* at 7. See *supra* note 72.

⁷⁴See *supra* note 72.

⁷⁵427 N.E.2d at 9.

⁷⁶*Id.* at 8.

court of appeals cases⁷⁷ were identical: the husband established a testamentary trust that provided his wife with income for life, with an unrestricted power to invade corpus during her life, and with an unrestricted power to appoint by will the corpus remaining at her death. In each case, the wife appointed the property to her estate at her death, and the issue was whether the wife's appointment was a transfer that is subject to the Indiana inheritance tax imposed on "property interest transfers" made by a decedent.⁷⁸ The courts reached opposite conclusions regarding the tax consequences.

In *Indiana Department of State Revenue v. Estate of Martindale*,⁷⁹ the second district court of appeals held that the appointment was not subject to the inheritance tax. The court reasoned that the creation of a power of appointment merely renders the donee a conduit for the transfer of property from the donor of the power to the appointee. The interest of the donee is not a property interest owned by the donee at her death, even if the donee has the power to invade the corpus of the appointable estate during her lifetime.⁸⁰ Furthermore, the death-time exercise of a power of appointment is not a taxable event, not only because the donee has no property interest to transfer, but also because the legislature intended to exclude exercise as a taxable event.⁸¹ This legislative intent is found in the 1929 repeal of a provision that made the exercise of a power of appointment a taxable event.⁸²

In *Indiana Department of State Revenue v. Estate of Hungate*,⁸³ the first district court of appeals took note of, but disagreed with, the conclusions of the *Martindale* court. The *Hungate* court held that the appointment was subject to the inheritance tax.⁸⁴ The court acknowledged that ordinarily the exercise of a power of appointment is not taxable, because the donee, as a conduit, is not transferring

⁷⁷Indiana Dep't of State Revenue v. Estate of Hungate, 426 N.E.2d 433 (Ind. Ct. App. 1981); Indiana Dep't of State Revenue v. Estate of Martindale, 423 N.E.2d 662 (Ind. Ct. App. 1981).

⁷⁸IND. CODE § 6-4.1-2-1(a) (1982).

⁷⁹423 N.E.2d 662 (Ind. Ct. App. 1981).

⁸⁰*Id.* at 665. The court noted that the power to invade corpus was the equivalent of an inter vivos power of appointment. Until a power of appointment is exercised in favor of the donee, the donee has no property interest that can be transferred. The donee is merely a conduit for the transfer from the donor to the appointee. The court held that the inter vivos power of appointment does not enlarge the donee's interest to anything more than a power to designate the takers of the donor's estate. *Id.* The court relied on analogous cases holding that a life estate is not enlarged into a fee by the existence of an inter vivos power to dispose of the fee.

⁸¹*Id.* at 666 & n.5.

⁸²Act of Mar. 11, 1921, ch. 275, § 7, 1921 Ind. Acts 854, 859-61, repealed by Act of Mar. 9, 1929, ch. 65, § 6, 1929 Ind. Acts 186, 209-10.

⁸³426 N.E.2d 433 (Ind. Ct. App. 1981), *aff'd*, 439 N.E.2d 1148 (Ind. 1982).

⁸⁴*Id.* at 435.

an interest owned by that donee. When the donee has an *inter vivos* power to invade corpus, however, the donee is no longer a mere conduit but is substantially an owner of the property. The exercise of the power of appointment, when the power is coupled with an *inter vivos* power to invade and to enjoy the appointable corpus, is a transfer of an interest owned by the deceased donee at her death and, thus, is taxable.⁸⁵

The question in both *Martindale* and *Hungate* was ultimately whether the legislature intended to tax the death-time exercise of a power of appointment when it is coupled with an *inter vivos* power to enjoy the corpus of the appointable estate. The legislature has not spoken to clarify its intent as to the taxability of such an appointment, and the conclusion of each court has logical support.

Both courts agreed that the legislature has expressed its intent to tax only property interest transfers of a decedent. Both courts agreed that the donee of a power of appointment is not the owner of an interest in the appointable property, but is a conduit for naming the taker of the property. Thus, the appointee takes from the donor of the power, not from the donee. The point of departure for the courts was on the issue of whether an unexercised right to use the corpus of the appointable property should enlarge the donee's interest into an ownership interest, rendering the appointment a transfer of property by the donee as owner, not as a conduit.

It is difficult to decide which conclusion is more sound and more in line with the probable legislative intent. The *Hungate* court's conclusion of taxability is supported by the fact that the donee looks like an owner, with full power to control the property *inter vivos* and at death. The *Martindale* court's conclusion of nontaxability, on the other hand, is supported by the fact that the donee becomes an owner of the appointable property only if the donee exercises the power in his or her favor. An unexercised power to invade corpus, like an unexercised power to revoke a trust, should not confer ownership status on the holder of the power. Perhaps the conclusion of the *Martindale* court, that the *inter vivos* right to invade corpus does not render the donee an owner of the property, is the better one, in that it is more consistent with the apparent legislative intent and supported by judicial decisions in analogous cases.⁸⁶

Another facet of the two cases is the fact that the power of appointment was exercised in favor of the donee's estate. Perhaps this fact, particularly when coupled with the fact that the donee has an

⁸⁵*Id.*

⁸⁶See, e.g., Indiana Dep't of Revenue v. Monroe County State Bank, 390 N.E.2d 1104 (Ind. Ct. App. 1979); *In re Estate of Bannon*, 171 Ind. App. 610, 358 N.E.2d 215 (1976). But see Indiana Dep't of State Revenue v. Estate of Hungate, 439 N.E.2d 1148 (Ind. 1982) (ownership interest existed, therefore was taxable).

inter vivos power to invade corpus, should render the exercise taxable under Indiana's inheritance tax laws. At the conclusion of the *Hungate* opinion, the court mentioned the special status of the donee as appointee in further support of its conclusion that the exercise of power was a taxable event.

Hungate was not merely a donee, but in fact was the appointee, because she designated her estate to be the recipient of the trust corpus. . . . Hungate received no title through herself as a donee, however, she received the title through the donor . . . when she named herself the appointee. The exercise of the power of appointment to herself, vested title in her estate, and therefore, the trust corpus should be included in her estate.⁸⁷

This line of reasoning is quite persuasive. When the donee appoints to her estate, the recipients of that estate appear to have received a transfer, from the donee, of property owned by that donee at the moment of the donee's death. The donee, at the moment of the appointment, is no longer merely the donee but the appointee, and thus, is the owner of the appointed property. The donee became the owner of the property by appointing the property to her estate and, simultaneously, she transferred that ownership to the recipients of her estate. In the case of appointment to the estate of the donee, fairness would seem to dictate that the property be subject to the inheritance tax because the property will be transferred out of that estate exactly as all "inherited" property is transferred, either by the effect of the deceased donee's will or by the laws of intestate succession.

Ultimately, perhaps, the difficulty in both cases was the appointment to the estate of the donee. Such an appointment should be avoided. Presumably, by appointing the property to her estate, the donee must have intended that the property pass to her devisees or heirs at law. Instead of appointing the property to her estate, the donee should have appointed the property directly to the appropriate devisees or to her heirs at law. In fact, the appointment directly to devisees or heirs would avoid the possibility that the donee's spouse or creditors could successfully assert an interest in the property. Furthermore, appointment directly to devisees or heirs might have given the *Hungate* court less incentive to search for reasons to hold the exercise of the power a taxable event.⁸⁸

D. Guardianships

New statutory provisions provide that a foreign guardian may col-

⁸⁷*Hungate*, 426 N.E.2d at 435. The *Hungate* court seemed swayed by its belief that the donee had appointed to herself when she appointed to her estate.

⁸⁸See *Hungate*, 426 N.E.2d at 434-35.

lect assets of the incompetent in Indiana by affidavit,⁸⁹ that a foreign guardian may act in Indiana by filing authenticated copies of his appointment,⁹⁰ and that a foreign guardian submits personally to the jurisdiction of the Indiana courts if he collects assets or files copies of his appointment or does any other act as guardian in Indiana that would have given Indiana courts jurisdiction over him as an individual.⁹¹ Another new guardianship provision allows a parent or guardian to delegate, for a period not to exceed sixty days, certain powers regarding care, custody, and property of an incompetent by a properly executed power of attorney.⁹²

A nonresident may now presumably serve as guardian of the person or of the estate of an incompetent in Indiana. The guardianship provisions state that one who is qualified to serve as a personal representative under Indiana Code section 29-1-10-1 is qualified to serve as guardian.⁹³ Now that section 29-1-10-1 has been amended to remove nonresidence as a disqualification for service as a personal representative,⁹⁴ it follows that nonresidence is removed as a disqualification for service as a guardian. Thus, if a client wants Aunt Marie in Missouri to be the guardian of the estate or of the person of his or her children at his or her death, Aunt Marie may qualify and serve in Indiana. Undoubtedly, however, if Aunt Marie resides in Missouri, her first act as guardian in Indiana will be to petition to change the residence of the children to Missouri.⁹⁵ Aunt Marie will then need to be appointed guardian of the children in Missouri.

Certainly, a lawyer should advise his client to name Aunt Marie, the preferred guardian, as guardian in that client's will. To avoid the additional expense of qualification, bonding, appointment, and discharge in Indiana, the will could also state the testator's request that Aunt Marie not be required to qualify in Indiana, but that Aunt Marie be permitted to take the children to her place of residence and be appointed guardian there. This provision would not be binding in any way on an Indiana court or on any other court, but it would serve as an expression of the expectations of the testator regarding the guardianship and it might help to avoid an additional unnecessary guardianship in Indiana.

⁸⁹Act of Feb. 15, Pub. L. No. 175, 1982 Ind. Acts 1330 (currently codified at IND. CODE § 29-1-18-51 (1982)).

⁹⁰*Id.* (currently codified at IND. CODE § 29-1-18-52 (1982)).

⁹¹*Id.* (currently codified at IND. CODE § 29-1-18-4.5 (1982)).

⁹²Act of Feb. 25, Pub. L. No. 176, 1982 Ind. Acts 1331 (currently codified at IND. CODE § 29-1-18-28.5 (1982)).

⁹³*Id.* § 29-1-18-9 (1982).

⁹⁴See *supra* notes 35-39 and accompanying text.

⁹⁵This is permissible under IND. CODE § 29-1-18-8 (1982).

XIX. Workers' Compensation

*TERRENCE CORIDEN

A. Jurisdiction

Indiana Code section 22-3-4-5,¹ which sets forth the jurisdiction of the Industrial Board, was construed in *Globe Valve Corp. v. Thomas*.² In *Globe Valve*, the claimant had been injured but had never received total disability benefits. Then, two years after the injury, the claimant filed a claim for compensation with the Industrial Board. The defendant filed a motion to dismiss alleging that because, prior to filing with the Industrial Board the claimant failed to demand workers' compensation or to attempt settlement of the claim, no dispute existed between the parties, as required by Indiana Code section 22-3-4-5. Nevertheless, the Industrial Board found a good faith dispute existed and awarded the claimant benefits.

Reversing the Industrial Board's decision, the Indiana Court of Appeals held that there was no evidence to support a finding that a good faith dispute had arisen as required by section 22-3-4-5.³ The court remanded the case with instructions for the Industrial Board to dismiss, stating that the Industrial Board has no jurisdiction over cases in which a good faith dispute is lacking.⁴

The court in *Globe Valve* did not consider the parties' actions tantamount to a good faith dispute. According to *Globe Valve*, as a condition precedent to the Industrial Board's exercise of jurisdiction, the claimant must affirmatively make a demand upon the employer, must be denied compensation, and must be able to prove the employer's denial at the Industrial Board hearing. Thus, if a claimant enters a law office with one day left in the statute of limitations period, an attorney must make an immediate telephone call to the employer setting forth the claimant's demands and must obtain a denial before filing a Form 9 application.⁵

The *Globe Valve* decision seems to favor procedure over substance. The court could have found that the defendant's failure to pay any temporary total disability for two years and that the defendant's op-

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¹IND. CODE § 22-3-4-5 (1982). This section provides, in part, that "[i]f the employer and the injured employee . . . disagree in regard to the compensation payable under this act . . . either party may then make an application, to the Industrial Board, for the determination of the matters in dispute." *Id.* (emphasis added).

²424 N.E.2d 155 (Ind. Ct. App. 1981).

³*Id.* at 157-58.

⁴*Id.* at 158.

⁵A Form 9 application is an application by the injured employee to the Industrial Board for an adjustment in the employee's claim for compensation.

position to the claimant's application for benefits constituted a sufficient showing of a good faith dispute.⁶ However, the court's interpretation of section 22-3-4-5 recognizes jurisdictional requirements that are in harmony with the well-founded public policy that "the law abhors litigation, and favors the settlement of disputes by the parties interested"⁷

B. Statute of Limitations

1. *Occupational Diseases.*—In *Bunker v. National Gypsum Co.*,⁸ the court held that the three-year statute of limitations period provided under section 22-3-7-9(f),⁹ relating to asbestos dust exposure, was unconstitutional.¹⁰ The rationale for this holding was that, at the time the legislature enacted the section, the legislature was unaware of medical findings which indicated that more than thirty years could expire before a disease caused by exposure to asbestos dust became manifest.¹¹

It is anticipated that the Indiana Supreme Court will accept transfer of this case and reverse the court of appeals, reinstating the three-year statute of limitations. The basis of the supreme court's reversal is expected to be on the grounds that the medical evidence which the court of appeals relied upon in its opinion was not within the Industrial Board's findings of fact.¹²

2. *Industrial Accidents.*—In *Coachmen Industries, Inc. v. Yoder*,¹³ the claimant suffered injuries to his neck, eye, ear, nose and arm as a result of a truck accident on May 14, 1974. Shortly thereafter, the employer and employee entered into a Form 12 agreement¹⁴ providing

⁶See *Patton v. Silvey Co.*, 395 So. 2d 722 (La. 1981).

⁷424 N.E.2d at 157 (quoting *In re Moore*, 79 Ind. App. 470, 475, 138 N.E. 783, 784 (1932)).

⁸426 N.E.2d 422 (Ind. Ct. App. 1981).

⁹IND. CODE § 22-3-7-9(f) (1982). This section provides that occupational diseases which are caused by the inhalation of asbestos dust must be filed within three years after the last day of the last exposure to asbestos. *Id.*

¹⁰426 N.E.2d at 425.

¹¹*Id.* at 425-26.

¹²Indiana's Administrative Adjudication Act, IND. CODE §§ 4-22-1-1 to -30 (1982), requires that a court reviewing a decision of an administrative agency limit its review to the record before it. Specifically, the Act requires that "[o]n such judicial review such court shall not try or determine said cause de novo, but the facts shall be considered and determined exclusively upon the record filed with said court pursuant to this Act." *Id.* § 4-22-1-18. Going beyond the record of the administrative hearing has been held to constitute an infringement upon the discretion of the agency. *E.g.*, Indiana State Highway Comm'n v. Zehner, 174 Ind. App. 176, 185, 366 N.E.2d 697, 702 (1977).

¹³422 N.E.2d 384 (Ind. Ct. App. 1981). For discussion on other issues in this case, see *infra* notes 56-58 and accompanying text.

¹⁴A Form 12 agreement is an agreement between the injured employee and the employer as to the amount and duration of compensation.

for payment of temporary total disability. The employer paid these benefits for a total of sixty-two weeks, until July 22, 1975, and then refused to make any additional payments. After unsuccessfully attempting to negotiate further benefits, the claimant's attorney, relying upon Indiana Code section 22-3-3-27,¹⁵ filed a Form 14 application on December 30, 1976, seeking a modification of the compensation award due to a change in condition.

In addition to other defenses, the defendant filed an affirmative defense based upon the untimeliness of the claimant's filing of the Form 14 application. This affirmative defense was based upon section 23-3-3-3,¹⁶ which bars compensation claims filed more than two years after the accident.

Obviously, applying section 23-3-3-3 to the facts would dictate a finding for the defendant because that statute of limitation had run. However, the court of appeals relied upon an old line of cases and affirmed the Industrial Board's modification of the original award.¹⁷ The court reasoned that the claimant's injuries, *at the time of the accident*, could not be medically determined to be a permanent impairment. Because the claimant's alleged permanent partial impairment must have resulted from the *injuries* and not *directly* from the accident, section 22-3-3-27 was the applicable statute governing the plaintiff's claim.¹⁸ Thus, the court found that the claimant must be

¹⁵IND. CODE § 22-3-3-27 (1982). This section provides, in part, that:

The power and jurisdiction of the industrial board over each case shall be continuing and from time to time, it may, upon its own motion or upon the application of either party, *on account of a change in conditions, make such modification or change in the award, ending, lessening, continuing or extending the payments previously awarded, either by agreement or upon hearing, as it may deem just*

The Board shall not make any such modification upon its own motion, nor shall any application therefor be filed by either party after the expiration of two (2) years from the last day for which compensation was paid under the original award made either by agreement or upon hearing, except that applications for increased permanent partial impairment are barred unless filed within one (1) year from the last day for which compensation was paid.

Id. (emphasis added).

¹⁶IND. CODE § 22-3-3-3 (1982). This section provides, in part, that "[t]he right to compensation under this act shall be forever barred unless within two (2) years after the occurrence of the accident, or if death results therefrom within two (2) years after such death, a claim for compensation thereunder shall be filed." *Id.* (emphasis added).

¹⁷422 N.E.2d at 389-91 (citing *Tom's Chevrolet v. Curtis*, 128 Ind. App. 201, 147 N.E.2d 571 (1958); *Pettiford v. United Dep't Stores*, 100 Ind. App. 471, 196 N.E. 342 (1935)).

¹⁸422 N.E.2d at 389-91. In a concurring opinion, Judge Sullivan pointed out a distinction between a resultant impairment and an impairment directly caused by the accident:

The impairment is "resultant" . . . only if it does not exist in any degree at the time of the accident, or if existent, cannot be determined to be permanent. If the accident is the direct cause of an impairment it is not "resultant," even though the impairment which exists at the time of the accident

allowed benefits because the claimant complied with section 22-3-3-27; that is, the claimant was making a request for a modification within two years from the last day for which compensation was paid under the original award.¹⁹

The end result in *Coachmen Industries* was equitable in light of the fact that the employer had in its files a letter dated November 13, 1975, stating that the claimant's injuries had now reached a permanent, quiescent status and that the claimant had suffered fifty percent permanent partial impairment to his right ear.

C. Scope of Employer's Liability

1. *The Traveling Salesman.*—In *Olinger Construction Co. v. Mosbey*,²⁰ the court of appeals was again confronted with the age old problem regarding the limits of an employer's liability for an employee who suffers an accidental injury, after normal working hours, while away from home due to his employment. In this case, the employee, Mosbey, was a surveyor whose duties required him to be in Lawrenceburg, Indiana, 150 miles away from his home and principal place of employment. When in Lawrenceberg, Mosbey was on-call twenty-four hours a day, in the event that a problem occurred on the night shift and the night shift needed Mosbey's professional advice; however, such an event rarely occurred.

One evening after work, while sitting in his motel room in Lawrenceburg, Mosbey was visited by a stranger, Mr. Bell. Unknown to Mosbey, Bell had been recently fired by their mutual employer, Olinger Construction Company. Bell gained entrance to Mosbey's room under the pretense that Bell needed help in a carpentry course he was taking. Upon entering the room, Bell robbed Mosbey and thereafter stabbed Mosbey to death.²¹

The Industrial Board awarded full benefits under the Workers' Compensation Act to Mosbey's surviving spouse and dependent children. In affirming the Industrial Board's decision, the court of appeals looked to Indiana Code section 22-3-2-2 which allows benefits

either increases in degree or lessens in degree, so long as the impairment which does exist is permanent in nature.

Id. at 394-95 (Sullivan, J., concurring).

¹⁹It should be noted that the defendant could have argued that section 22-3-3-27 did apply, but the claimant's application was barred because the claimant was seeking an increase in benefits and such applications are barred by section 22-3-3-27 unless filed within one year from the last day for which compensation was paid. IND. CODE § 22-3-3-27 (1982).

²⁰427 N.E.2d 910 (Ind. Ct. App. 1981).

²¹The facts, as stated by the court, indicate that there was no evidence that Bell was attempting to visit retribution upon his former employer by killing Mosbey.

to an employee if the accident arose "out of and in the course of the employment."²² In applying these criteria to the facts in *Mosbey*, the court found that a traveling employee is "in the course of" his employment from the time he begins his travels until he returns home or to his business, *unless* he embarks on a personal errand.²³ Clearly, *Mosbey* had not embarked on a personal errand at the time of his death. Furthermore, the court found that injuries arise "out of" the employment when there is a causal connection between the injuries and the employment.²⁴ The court stated that a causal connection exists when an accident arises out of a risk which reasonable men might comprehend as incidental to the employment *or* when there is a relationship between the working condition and the resulting injury.²⁵

In finding that the accident in *Mosbey* arose "out of" the employment, the majority of the court adopted the positional risk theory which defines "out of" as any situation in which the employee is required to be at a certain place and the injury occurs when he is there.²⁶ However, in a well written dissent, Judge Sullivan disagreed with the majority's conclusion that the accident arose out of *Mosbey*'s employment because he adhered to the traditional increased risk theory.²⁷ The increased risk theory defines "out of" as any situation in which the employee is exposed to a quantitatively greater risk than the general public either because the danger is greater *or* because the employee is exposed to the danger for a longer period of time than the general public.²⁸ Further, Judge Sullivan stated that even under the majority's theory *Mosbey*'s injuries did not arise "out of" the employment because there was no causal connection between *Mosbey*'s residence at the motel and the criminal act of a third party.²⁹

It should be noted that even though the majority opinion upheld the Industrial Board's decision under the positional risk theory, this same case could have been upheld under the increased risk theory. Because *Mosbey* was identified as an employee who was away from home for an extended period of time, and who may be expected to have a significant amount of cash on him, the court could have found

²²IND. CODE § 22-3-2-2 (1982).

²³427 N.E.2d at 913.

²⁴*Id.* at 912.

²⁵*Id.*

²⁶See A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 6.50, 11.40 (1978). Under this theory, the degree of danger is immaterial to the determination of whether the injury "arose out of" the employment. Simply stated, the positional risk theory is nothing more than a "but for" test.

²⁷427 N.E.2d at 916 (Sullivan, J., dissenting).

²⁸See A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 6.30, 9.30 (1978).

²⁹427 N.E.2d at 916 (Sullivan, J., dissenting).

that Mosbey was exposed to a quantitatively greater risk as required by the increased risk theory.

2. *After Work and On The Premises.*—*Lona v. Sosa*³⁰ addressed the question of whether the fatal shooting of a bartender-employee, at his place of employment after the bartender-employee was off duty, constitutes a compensable injury arising out of the employee's course of business. In this case, the normal duties of the bartender-employee consisted of opening the bar, cleaning up the bar from the previous night's activities, and working at the bar until about 5:00 p.m. In addition to these duties, the general manager would periodically request the employee to work additional nighttime bartending hours.

One evening, the employee remained at the bar after the general manager had returned to relieve him of his bartending duties, and the employee commenced drinking with a third party. After approximately two and one-half hours had elapsed, the general manager accused the employee of stealing because the cash register receipts were short five dollars. The general manager then pulled out a shotgun and killed the employee. The bartender-employee's widow filed an application for benefits with the Industrial Board, and the Industrial Board awarded death benefits to the widow.

The court of appeals reversed the Industrial Board's decision holding that, when it is before or after regular working hours, an employee is only deemed to be "in the course of" his employment if the employee is engaged on the premises in preparatory or incidental activities reasonably related to his work and if the period of time to perform such work is reasonable.³¹ The court stated that there was no evidence to support the Industrial Board's finding that the decedent was in the course of his employment, either as a bartender or as a cleanup person, because the decedent had been relieved of all duties for approximately two and one-half hours when the shooting occurred.³² The court further stated that, to arise out of the course of employment, the injury must take place within the time and space boundaries of the employment and within the course of an activity related to the employment.³³ The court noted that an activity is related to the employment if it carries out the purposes or advances the interest of the employer, either directly or indirectly.

Alternatively, the court could have upheld the decision of the Industrial Board by finding that the employee's presence at the tavern advanced a benefit to the employer, by allowing the general manager, who was balancing the books that evening, to have an on-the-spot conversation with the employee who was in charge of the cash

³⁰420 N.E.2d 890 (Ind. Ct. App. 1981).

³¹*Id.* at 894.

³²*Id.*

³³*Id.*

register, in the event that some question or mistake arose concerning the cash receipts.³⁴ Furthermore, the court could have held that, even though the employee was not on duty during the two and one-half hour period, the employee immediately came back within the course of his employment for the purposes of resolving the cash shortage. However, there is no indication that such contentions or arguments were made.

3. *After Work and Off The Premises.*—In *Wayne Adams Buick, Inc. v. Ference*,³⁵ a bookkeeper was requested, by her employer, to deposit the company mail in a mailbox across the street from her place of employment, on her way home. After depositing the mail, the bookkeeper was assaulted by two hoodlums on the street. As a result of this incident, the bookkeeper sought and was awarded workers' compensation benefits.

On appeal, the court acknowledged that whether an employee is acting within the course of employment is a question of fact; however, the court stated that such a finding is determined by whether the act is within a reasonable amount of time and space before the start and after the cessation of employment.³⁶ The court in *Ference* found that the act of mailing the company mail was within a reasonable time after the cessation of the bookkeeper's employment and, thus, held that the bookkeeper was within the course of her employment at the time of the assault.³⁷

It should be noted that the facts of this case indicated that the bookkeeper normally remained inside the door of her employer's business until her husband arrived and then she would go directly to the waiting car in front of the employer's business. She followed this cautious procedure each day with the exception of when she periodically mailed the company's mail. Because the employee normally took this precautionary measure to assure that she would not encounter such an assault, it was reasonable to hold the employer responsible for those perils that the bookkeeper encountered as a result of the employer putting her in a hazardous situation. The employer's liability should continue until the employee has an opportunity to go directly from the mailbox to a place of safety.

D. Injuries Caused by Employment-Related Accidents

During the survey period, the courts again wrestled with the question of whether the claimant's activities at his place of employment

³⁴The reported facts do not indicate whether this was the employer's normal practice.

³⁵421 N.E.2d 733 (Ind. Ct. App. 1981).

³⁶*Id.* at 736 (quoting *Payne v. Wall*, 76 Ind. App. 634, 636-37, 132 N.E. 707, 708 (1921)).

³⁷421 N.E.2d at 736.

caused the condition for which the claimant now seeks benefits. In *Lovely v. Cooper Industrial Products*,³⁸ the employee filed a Form 9 application³⁹ seeking compensation for the injury to his fourth and fifth lumbar disc interspace. The employee had worked for the defendant operating certain types of machinery which periodically required the claimant to do a significant amount of strenuous pulling and jerking. While on the job, the claimant felt a pain in his back; however, at the hearing before the Industrial Board, he was unable to point to any specific event that caused the pain in his back. Therefore, the Industrial Board denied benefits to the claimant.

Affirming the Industrial Board's decision, the court of appeals held that the medical evidence tendered at the hearing failed to show that the claimant's complaints were causally connected to his work at the employer's place of business.⁴⁰ Although the medical evidence indicated that the claimant's complaints about his back were consistent with the type of injury that could be caused by the job the claimant was performing, the doctor testified that the claimant had suffered boney arthritic problems in his back for six years, and the boney arthritic problems could also cause the same type of pain as that of which the claimant was complaining. In substance, the court held that there was sufficient evidence to support the Industrial Board's conclusion that the claimant did not meet his burden of proving that the work activities were more likely to cause the claimant's present condition than the other activities in his daily life.⁴¹

It should be noted that in discussing whether the claimant's injury was caused by a work-related accident, the court did clarify its understanding of the term "accident." The court stated that, for a claimant to show an accident caused the injury, the claimant must prove an unexpected incident or result occurred, and the claimant must prove a greater connection between work and the injury than the mere fact that the disability became manifest during the time the claimant was employed.⁴²

In *Bowling v. Fountain County Highway Department*,⁴³ the court of appeals also affirmed the Industrial Board's denial of a claimant's Form 9 application on the grounds that even though the claimant could point to a specific time and place when his back became painful, this was insufficient, in itself, to support a claim for compensation.⁴⁴ In

³⁸429 N.E.2d 274 (Ind. Ct. App. 1981).

³⁹For a description of a Form 9 application, see *supra* note 5.

⁴⁰429 N.E.2d at 276.

⁴¹*Id.* at 279.

⁴²*Id.* at 277 (construing *Calhoun v. Hillenbrand Indus., Inc.*, 269 Ind. 507, 381 N.E.2d 1242 (1978)).

⁴³428 N.E.2d 80 (Ind. Ct. App. 1981).

⁴⁴*Id.* at 81.

Bowling, the claimant stated that he felt the pain in his back at the point in time when he stepped eighteen inches down from a low-boy trailer. However, the evidence indicated that the employee had a pre-existing, degenerative condition that had reduced itself to a point of being painful.

In both *Lovely* and *Bowling*, the courts were dealing with the problem of a claimant with a pre-existing condition that had degenerated and become painful while the claimant was on the job. In both cases, medical evidence could not establish any particular activities the claimant was performing at work as the cause of his present condition, any more than the activities of the claimant which were not employment-related. The result in *Lovely* may have been different had the medical evidence stated that, within a reasonable degree of medical certainty, the pulling and jerking that *Lovely* was required to do at his place of employment caused his present condition. However, it seems unlikely that the Industrial Board or the courts would arrive at a different result in *Bowling* because a different result would simply mean that if an employee begins feeling pain while at work, then the employer is liable for the condition. Such result is not in accord with the interpretation the courts have given to the definition of an accident.⁴⁵

E. Employee's Civil Actions Against Co-Employees, Third Parties, and Employer's Insurers

In expanding the right of an employee to file suit against medical providers who are employed by the company and negligently treat the injured employee, the court in *McDaniel v. Sage*⁴⁶ held that a nurse who was employed by the company was not immune from suit by her co-employee when the nurse carried out her duties as a professional by administering treatment to the injured employee.⁴⁷ The court's rationale was that the nurse was an independent contractor because the employer did not have specific control over the professional in the performance of her duties, and because the employer could not intervene in the nurse-patient relationship.⁴⁸ Thus, the normal rationale for immunity of suits between fellow employees did not exist.

In *McGammon v. Youngstown Sheet and Tube Co.*,⁴⁹ the court of appeals held that an employee who settles his suit against a third

⁴⁵See *supra* note 42 and accompanying text.

⁴⁶419 N.E.2d 1322 (Ind. Ct. App. 1981).

⁴⁷*Id.* at 1326. IND. CODE § 22-3-2-13 (1982) abrogates a lawsuit by one employee for an injury sustained in the course of employment.

⁴⁸419 N.E.2d at 1325-26. See also *Ross v. Schubert*, 388 N.E.2d 623 (Ind. Ct. App. 1979).

⁴⁹426 N.E.2d 1360 (Ind. Ct. App. 1981).

party before judgment for injuries sustained within the provision of the Workers' Compensation Act is forever barred from further compensation or expenses from his employer.⁵⁰ This holding forces the practitioner to take a very close look at any third party actions before pursuing them because he may cause the employee to lose more money by filing civil suits than the employee would have realized by pursuing his workers' compensation remedies exclusively.

The court of appeals also dealt with the exclusivity of remedy for workers injured on the job in *Baker v. American States Insurance Co.*⁵¹ After being injured on the job, the plaintiff received treatment from a doctor furnished by the employer's workers' compensation insurance carrier. Thereafter, the employer's workers' compensation carrier told the claimant that the doctor had rated the claimant's impairment as 24.5% and, on that basis, tendered a settlement offer to the plaintiff. After settling his claim, the claimant discovered that the actual impairment rating was 62%. The claimant then prosecuted his claim before the Industrial Board.

After receiving the full award from the Industrial Board, the plaintiff then filed a civil suit against the employer's workers' compensation carrier alleging that he was entitled to compensatory damages for attorney fees incurred in filing his Form 9 application because the insurance company had not acted in good faith and had acted fraudulently by misrepresenting the impairment rating in settling his claim. The trial court interpreted Indiana Code section 22-3-2-6⁵² as establishing that the Indiana Workers' Compensation Act provided the exclusive remedy for the plaintiff's injuries and, thus, dismissed the case for failure to state a cause of action for which relief could be granted. The court of appeals, however, reversed the trial court's dismissal of the complaint. The appellate court circumvented the exclusivity of remedy theory by finding that section 22-3-2-6 only pertains to remedies of an employee "For personal injury or death by accident arising out of and in the course of the employment,"⁵³ and the claim in *Baker* was one for fraud against the insurance company for the company's acts of bad faith.⁵⁴

⁵⁰*Id.* at 1363.

⁵¹428 N.E.2d 1342 (Ind. Ct. App. 1981).

⁵²IND. CODE § 22-3-2-6 (1982). This provision sets out the exclusivity of a worker's remedies as follows:

The rights and remedies granted to an employee subject to [this act] on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death.

Id.

⁵³428 N.E.2d at 1346 (quoting IND. CODE § 22-3-2-2 (1982)).

⁵⁴428 N.E.2d at 1346-47.

It should be noted, however, that the appellate court affirmed the dismissal of the plaintiff's claim in regard to attorney fees as an element of damages. The court recognized that the employee could be awarded attorney fees when the employer's workers' compensation carrier acts in bad faith, but Indiana Code section 22-3-4-12 was the exclusive remedy for such a claim.⁵⁵ Thus, because the plaintiff did not file a claim against the employer or the employer's workers' compensation carrier asking for attorney fees over and above the award, the appellate court did not allow the plaintiff to ask for attorney fees in the civil suit.

It could be argued that the Workers' Compensation Act was intended to cover the type of claim asserted in *Baker*. The Indiana Legislature intended the Workers' Compensation Act to be a comprehensive approach to workers' rights and remedies. Therefore, in order to not interfere with the intent of the legislature, the exclusivity of a worker's remedy should remain within the Workers' Compensation Act until such time as the legislature sees fit to grant exclusions.

F. Employer's Bad Faith

In *Coachmen Industries, Inc., v. Yoder*,⁵⁶ the court of appeals found there was insufficient evidence to support the Industrial Board's award of additional attorney fees to the claimant's attorney due to the employer's bad faith and dilatory conduct in settling the claim. The Industrial Board had determined that the failure of the employer to tender a settlement offer pursuant to the fifty percent permanent partial impairment rating as set forth by the employer's own physician constituted bad faith. In reversing the Industrial Board, the court found that the employer could not be acting in bad faith because under a settlement agreement for the claimant's total disability, the employer had already paid the claimant all he would be entitled to for a fifty percent permanent partial impairment.⁵⁷ Thus, the court concluded that the evidence before the Industrial Board indicated, at most, that the parties had merely disagreed after a good faith effort to settle the claim.⁵⁸

G. Discovery Matters

In *Josam Manufacturing Co. v. Ross*,⁵⁹ the court of appeals, for

⁵⁵*Id.* The court stated that the employee may be awarded attorney fees where the employer or insurer acts in bad faith, but only under IND. CODE § 22-3-4-12 in a claim with the Industrial Board. See IND. CODE § 22-3-4-12 (1982).

⁵⁶422 N.E.2d 384 (Ind. Ct. App. 1981). See *supra* notes 13-19 and accompanying text.

⁵⁷422 N.E.2d at 387, 393-94.

⁵⁸*Id.* at 394.

⁵⁹428 N.E.2d 74 (Ind. Ct. App. 1981).

the first time, specifically held that the Workers' Compensation Act and the Industrial Board fall within the purview of the Administrative Adjudication Act, and, therefore, the trial rules pertaining to discovery⁶⁰ are applicable in Industrial Board cases.⁶¹ Thus, all the discovery tools utilized in civil cases can now be utilized before the Industrial Board. Also, to facilitate discovery, the Industrial Board now has the same power to sanction recalcitrant parties.

H. Evidentiary Matters

1. *Reasonable Medical Certainty*.—The court of appeals, in *Noblesville Casting, Division of TRW, Inc. v. Prince*,⁶² held that when a physician is testifying about his medical opinion, he must base that opinion on reasonable medical certainty in order to show that the claimant's injuries were caused by the accident.⁶³ The failure to couch a physician's opinion in these terms risks dismissal of the claim at the close of the evidence for failure to prove the case.⁶⁴

2. *Degree of Impairment*.—Although it is necessary for a physician to testify concerning the cause and permanency of a claimant's injuries, the court in *Coachmen Industries, Inc. v. Yoder*,⁶⁵ held that the claimant, himself, may testify as to the impairment that he suffers and the degree of that impairment.⁶⁶ Thus, the claimant may say that he is twenty percent impaired. However, he may not say that he is permanently impaired. The distinction is that the employee understands the limitations that the injury places on his bodily functions, but it is a medical determination as to how long his bodily functions will remain impaired.

⁶⁰IND. R. TR. P. 26-37.

⁶¹428 N.E.2d at 76-77.

⁶²424 N.E.2d 1055 (Ind. Ct. App. 1981), *rev'd, vacated*, 438 N.E.2d 722 (1982 Ind.)

⁶³*Id.* at 1058. After survey period, Indiana Supreme Court changed standard to "possible". See *Noblesville Casting, Division of TRW, Inc. v. Prince*, 438 N.E.2d 722 (1982 Ind.).

⁶⁴424 N.E.2d at 1058.

⁶⁵422 N.E.2d 384 (Ind. Ct. App. 1981).

⁶⁶*Id.* at 392.

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